Supreme Court, U.S.
FILED

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No.

IN THE

Supreme Court of the United States

IN RE: ROLAND C. LEWIS

PETITION FOR A WRIT OF MANDAMUS TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF MANDAMUS

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QUESTIONS PRESENTED FOR REVIEW

Roland Lewis, a disabled Mississippi trial lawyer, was sued by his disability insurer, Woodmen of the World Life Insurance Society for declaratory judgment and return of payments advanced under a reservation of rights, or in the alternative for arbitration, and months later, Woodmen filed a Motion to Arbitrate. Lewis answered with a compulsory counterclaim and third party complaint against Woodmen's administrator, Monarch Life Insurance Company.

Lewis prevailed on the arbitration issue in the United States District Court for the Southern District of Mississippi, Woodmen prevailed in the United States Court of Appeals for the Fifth Circuit, and Lewis's Petition for Rehearing En Banc was denied Per Curiam without opinion.

The Fifth Circuit's opinion stated that the question of the unconscionability of the arbitration provision was not raised in the district court, and declined to consider it. The question of unconscionability was presented to the district court and to the appellate court, but the Fifth Circuit inexplicably refuses to acknowledge that fact.

The holdings in *Iberia Credit Bureau Inc., Etc. et al. v. Cingular Wireless LLC, et al.*, 379 F. 3d 159 (5th Cir. 2004), *Banc One Acceptance Corp. v. Hill*, 367 F. 3d 426 (5th Cir. 2004) relating to enforcing state doctrines of unconscionability to invalidate arbitration clauses as required by decisions of this Court (*Doctor's Assocs. V. Casarotto*, 517 U.S. 681, 687) and to conform to other Circuits, as well as Mississippi Supreme Court decisions such as *East Ford, Inc. v. Taylor*, 826 So. 2d 709 (Miss.

Sup. Ct. 2002), *United Credit Corp. v. Hubbard*, 2004 Miss. LEXIS 1455 and *Pitts v. Watkins*, 2005 Miss. LEXIS 260 compel an affirmance of the district judge's decision not to enforce the arbitration on the issue of unconscionability of the arbitration provision if only the Fifth Circuit would address the issue.

The issue becomes does the Fifth Circuit's inexplicable refusal to address a critical issue raised in the district court exhibit usurpation of judicial power or an abuse of discretion to the extent that this Court should intervene through its supervisory duty to mandate the Fifth Circuit to explain its refusal to ignore the briefs and arguments presented to it on the question of unconscionability of the arbitration provisions of the insurance contract and to compel consideration of that issue?

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OPINIONS BELOW

The Order entered by United States District Judge Henry T. Wingate, United States District Court for the Southern District of Mississippi, filed on September 30, 2003, is not officially published and is reprinted at App. p. 15a. The opinion of the United States Circuit Court of Appeals for the Fifth Circuit, Judges Thomas M. Reavley, W. Eugene Davis, and Jacques L. Wiener, Jr., filed on December 17, 2004, reversing the United States District Court for the Southern District of Mississippi is not officially published and is reprinted at App. p. 1a. The opinion of the United States Circuit Court of Appeals for the Fifth Circuit denying the Petition for Rehearing En Banc, filed on February 21, 2005, is not officially published and is reprinted at App. p. 27a.

ADDITIONAL MATERIALS

Defendant's Response to Memorandum in Support of Motion to Compel Arbitration, on behalf of Roland Lewis dated November 12, 2002, showing that unconscionability was an issue, is reproduced at App. p. 43a.

Woodmen's Rebuttal Memorandum in Support of Motion to Compel Arbitration, responding to the unconscionability argument, is reproduced at App. p. 29a.

JURISDICTION

Jurisdiction is conferred on this Court by 28 U.S.C. Sec. 1651(a).

STATEMENT OF THE CASE

Woodmen of the World Life Insurance Society, Appellant in the Court of Appeals for the Fifth Federal Circuit, filed suit against Roland Lewis, its policy holder, to compel arbitration, or in the alternative, for declaratory judgment "...declaring the parties' rights under the policies, including Lewis' right, if any, to benefits, and awarding Woodmen all damages to which it is entitled by law, including reimbursement for all benefits paid to Lewis, under reservation of rights, including pre-judgment interest, attorney's fees and costs." The Complaint alleged that Woodmen had paid $480,000.00 overhead expense policy benefits to Lewis, which has now been paid in full. Woodmen further alleged that it paid Lewis $133,606.67 in disability income benefits which continue to be paid at $5,050.00 per month, until he reaches the age of 65, which Lewis will reach in 2008.

Lewis paid the premiums on the policies from February 1988 until the Social Security Administration determined that he was totally disabled on August 18, 1999. No arbitration provision existed in the policies Lewis purchased, until Woodmen amended its constitution in December 1996, setting up a "Problem Resolution Procedure" requiring the policy holder to settle any disputes in steps, first by contacting the designated Problem Resolution Officer, then if not satisfied, request mediation, and if unsuccessful, then arbitration was required. Lewis never requested any problem resolution because he was being paid under the policies, albeit through a reservation of rights.

Woodmen's Motion to Compel Arbitration was denied by the District Court, after a telephonic motion hearing on October 4, 2002. During the Motion hearing conducted by U.S. District Judge Henry Wingate several issues were argued and discussed, *including unconscionability of the arbitration provision.* No record was made of this hearing.

Judge Wingate rendered his opinion and Order on the Motion to Compel Arbitration on September 30, 2003, holding only that the procedure leading to arbitration could be initiated solely by the policy holder, thereby addressing only the initiation of the arbitration procedure. The opinion necessarily held that the arbitration procedure was one-sided and compelled the policy holder to initiate arbitration while not requiring Woodmen to do so, thereby rendering the arbitration clause unconscionable under Mississippi law and by established Fifth Circuit law.

The Fifth Circuit conducted oral arguments on December 1, 2004, after which the panel issued its opinion reversing the district court. The decision of the Panel was filed on December 17, 2004, which found that since the issues of unconscionability and waiver were not argued in the district court, the panel would not consider them.

Lewis filed a Petition for Rehearing En Banc which was denied February 21, 2005, Per Curiam, requiring all issues to be decided by arbitration.

REASONS FOR GRANTING THE PETITION

1. *Applying the law is sufficient reason to compel the Fifth Circuit to exercise its authority to consider the issue of unconscionability when it has a duty to do so.*

The federal court system will enforce state contract law, including arbitration agreements. Indeed, "...generally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements without contravening Sec. 2." *Doctor's Assocs. V. Casarotto,* 517 U.S. 681, 687. See also: *Al-Safin v. Circuit City Stores, Inc.*, 394 F.3d 1254,C.A.9 (Wash.), 2005.

Kerr et al v. United States District Court for the Northern District of California et al., 426 U.S. 394 succinctly describes the office of mandamus:

> The remedy of mandamus is a drastic one, to be invoked only in extraordinary situations. *Will v. United States,* 389 U.S. 90, 95 (1967); *Bankers Life & Cas. Co. v. Holland,* 346 U.S. 379, 382-385 (1953); *Ex parte Fahey,* 332 U.S. 258, 259 (1947). As we have observed, the writ "has traditionally been used by the federal courts only 'to confine an inferior court to a lawful exercise of its prescribed jurisdiction **or to compel it to exercise its authority when it is its duty to do so.**'" *Will v. United States, supra,* at p. 95, quoting *Roche v. Evaporated Milk Assn.*, 319 U.S. 21, 26 (1943). *Id.*, p.402 (Emphasis added)

The Mississippi law relating to unconscionability of arbitration provisions is set out in *East Ford, Inc., v. Taylor*, 826 So. 2d 709 (Miss. 2002):

> It has been recognized that in order to determine whether legal constraints exist which should preclude arbitration, 'courts generally...should apply ordinary state law principles that govern the formation of contracts.' *Banc One, N.A. v. Coates*, 125 F. Supp. 2d 819, 827 (S.D. Miss. 2001) (quoting *Webb v. Investacorp, Inc.*, 89 F. 3d 252, 257 (5th Cir. 1996)...
>
> In other words, the usual defenses to a contract such as fraud, unconscionability, duress, and lack of consideration may be applied to invalidate an arbitration agreement, so long as the law under which the provision is invalidated is not applicable only to arbitration provisions... *Id.* (Emphasis added).

In a decision rendered on December 9, 2004, after the filing of the briefs and oral argument of this case, but before the decision of this case in the Fifth Circuit, the Mississippi Supreme Court in *United Credit Corp. v. Hubbard*, 2004 Miss. LEXIS 1455, the trial court's order denying the motion to compel arbitration was reversed. In the opinion, the Supreme Court discussed the necessary factors to be considered in arbitration cases. Important in this decision to compel arbitration was the finding that: "The arbitration agreement equally binds both UCCM and Hubbard. There is no disparity in bargaining power or either party's ability to arbitrate any

issue stemming from the loans made to Hubbard. Therefore, the arbitration agreement was not substantively unconscionable because both parties were guaranteed the same rights by the agreement." (Emphasis added).

United Credit, supra, was followed by *Pitts v. Watkins, 2005* Miss. LEXIS 260, which examined the arbitration clause in a home inspection contract from a substantive standpoint. In *Pitts, supra,* the Mississippi Supreme Court is directly in point here. There the arbitration clause required the homeowner to arbitrate any claims against the Home Inspection Company, while it allowed the Home Inspection Company to file suit against the homeowner. That procedure was found to be substantively unconscionable.

The Mississippi Supreme Court's holdings are important to this issue because of the Fifth Circuit's decision in *Iberia Credit Bureau Inc., Etc. et al. v. Cingular Wireless LLC, et al.,* 379 F. 3d 159 (5th Cir. 2004) published after the filing of briefs, but which was extensively discussed during oral argument before the Fifth Circuit and argued in the Petition for Rehearing En Banc. *Iberia, supra,* involved construction of Louisiana law. The opinion observed: "...the agreement appears to require only the customer to arbitrate all disputes, leaving the company with the choice of pursuing a lawsuit instead of arbitrating. Louisiana cases suggest that this is a particularly troubling provision..." *Id., p.* 168.

The offending language was quoted in the opinion as follows:

> Dispute Resolution; Waiver of Trial by Jury; Waiver of Class Actions-Please read this section carefully. It affects rights that you may otherwise have. It provides for resolution of most disputes through arbitration instead of Court trials and class actions. You agree that instead of suing in court, you will arbitrate any and all disputes and claims arising out of this Agreement or the Service. Even if applicable law provides otherwise, you and we each waive our right to a trial by jury and to participate in class actions...By this agreement, both you and we are waiving certain rights to litigate disputes in court. If for any reason this arbitration clause is deemed inapplicable or invalid, you and we both waive, to the fullest extent allowed by law, any claims to recover punitive or exemplary damages and any right to pursue any claims on a class or consolidated basis or in a representative capacity. *Id.*, p. 168.

Finally, the *Iberia* Court stated: "While most of the statements in this paragraph refer to 'you and we' waiving certain rights, the critical sentence in the middle that sets forth the duty to arbitrate says only that 'you agree' that 'you will arbitrate' rather than sue in court." *Id.*, p. 168. The Court concluded that the one-sidedness of the duty to arbitrate raised serious questions as to the validity of the arbitration clause and found that the district court's finding of unconscionability was not error and affirmed his denial of defendant's motion to compel arbitration.

Woodmen's arbitration provision, here, is contained in the third and final step of the dispute resolution procedure. It is much more restrictive than that condemned in *Iberia, supra.* For example, Section 2 (A) defines the purpose as providing "...opportunities for members and benefit certificate owners and beneficiaries to be promptly heard and to seek fair resolution of any disputes...without the delay and expense of formal legal proceedings."

Further, Section 2(B) Scope states:

> This Section 2 shall apply whenever a **member or benefit certificate owner or beneficiary of the Society** makes a claim for damages, or claims any form of redress for a violation of his or her individual rights or a denial of individual privileges or benefits which he or she claims as a member or benefit certificate owner or beneficiary.
>
> This includes, but is not limited to, disputes involving alleged fraud, misrepresentation, discrimination, denial of civil rights, conspiracy, defamation, or infliction of distress by the Society or any officer, employee or agent of the Society; and **includes disputes regarding the denial of benefit claims** under any certificate to the extent the procedures of this Section 2 are not prohibited by applicable laws. **No lawsuit may be filed against the Society or any officer, employee, or agent of the Society on**

> **any dispute covered by this Section 2 until the procedures described herein have been exhausted; and a lawsuit may then be filed only if the applicable law does not recognize the procedures herein to be final and binding with respect to the matter in dispute...**(Emphasis added)

It is clear that Woodmen's policy is one-sided as prohibited by *Iberia, supra,* in the application of Louisiana law as was done in *Iberia, supra,* and Mississippi law in *United Credit Corporation, supra, East Ford, Inc., supra,* and *Pitts v. Watkins, supra,* the arbitration agreement is unconscionable. The Fifth Circuit, in *Banc One Acceptance Corp. v. Hill,* 367 F. 3d 426 (5th Cir. 2004) approved the reasoning in *East Ford.* Left undisturbed, the Fifth Circuit's opinion requires Woodmen policy holders to arbitrate, but does not require Woodmen to do so. Such a provision invites insurers to file suit at any time with assurance that arbitration will be granted during which time the policy holder could be liable for any amount already paid to him under a reservation of rights.

2. *By refusing to consider the unconscionability issue, the Fifth Circuit's action appears to have been an abuse of discretion or usurpation of judicial power.*

Appellee's (Lewis') Petition for Rehearing En Banc, attached copies of Defendant's (Lewis') Response to Memorandum in Support of Motion to Compel Arbitration filed in District Court and Rebuttal Memorandum (Woodmen's) in Support of Motion to Compel Arbitration filed in District Court as proof that

the issue of unconscionability was argued. Lewis did not initially present the issue to the Fifth Circuit because he won in the District Court. The appeal was initiated and the issues were chosen by Woodmen. There was little need to argue unconscionability in Lewis' brief, when the main points were selected by Woodmen, based upon the narrow issue chosen by the district judge to rule in favor of Lewis. Nonetheless, Lewis did raise the issue of unconscionability in his briefs, and in great detail in his oral arguments.

In refusing to consider the unconscionability issue, the Fifth Circuit's opinion relied on *In re Fairchild Aircraft Corp.*, 6 F. 3d 1119, 1128 (5th Cir. 1993) for the proposition that Lewis failed to brief the issue of unconscionability in his Answer to Motion to Compel Arbitration before the district court. The briefs show otherwise. *Fairchild* was a bankruptcy case, and held that the argument must be raised to such a degree that the trial court may rule on it, and it simply found in that case it was not done. Also cited was *United States v. Drobny*, 955 F. 2d 990, 995 (5th Cir. 1992), a securities fraud case. The court found that there was only one passage in any pleading relating to the issue, and that the government's argument was itself equivocal, saying the issue raised on collateral attack was not raised on direct appeal, and then saying in the next sentence that it really was.

This seems to be shaky authority to foreclose consideration of such an important issue. While it is true that the main focus of unconscionability shifted in view of the cases decided after the briefs and argument in the *district court*, the Fifth Circuit had the benefit of every other case cited in this Petition, except *Pitts, supra*, and

perhaps *United Credit Corporation, supra,* decided by the Mississippi Supreme Court on December 9, 2004, after oral argument in the Fifth Circuit but before its reversal decision (which reinforced already established Mississippi law; *i.e., East Ford, supra,* and others; see *Russell v. Performance Toyota, Inc.*, 826 So. 2d 719 (Miss. 2002)) entertained argument on the very points of them, and even quizzed the attorneys on these points during argument. Is form to rule over substance? Is Roland Lewis, and other unfortunates like him, to suffer because of an inexplicable refusal to apply the law?

There is ample authority in the Fifth Circuit to affirm the district court's decision on any ground urged below, regardless of whether it was relied on by the district court. See *Cross v. Lucius*, 713 F. 2d 153 (5th Cir. 1983) fn 3; *Bickford v. Int'l Speedway Corp.*, 654 F. 2d 1028, 1031 (5th Cir. 1981); and *Williams v. Butler*, 819 F. 2d 107 (5th Cir. 1987) fn 1. Not to do so in this case is an abuse of discretion.

3. *Mandamus is proper in this case*

While it is recognized that the case law requires three conditions to be met before the writ can issue; *i.e.*, the party seeking issuance of the writ must have no other adequate means to attain the relief he desires, the petitioner must satisfy the burden of showing that his right to issuance of the writ is clear and indisputable, and even if the first two prerequisites have been met, it is in the discretion of the issuing court. In *Richard B. Cheney, Vice President of the United States, et al., Petitioners v. United States District Court for the District of Columbia, et al.* , 124 S. Ct. 2576 (2004), these requirements were discussed, citing authorities omitted here, and then said:

"These hurdles, however demanding, are not insuperable." *Id.*, p. 2587.

In considering applying for a Writ of Certiorari in this case, it became clear that there was nothing to appeal. The Fifth Circuit found that Lewis made enough claims to Woodmen to invoke arbitration and simply refused to consider what turned out to be the controlling issue in the case-unconscionability. The opinion stated what was really a fact question--was the issue raised in the district court? The briefs and arguments say it was. The opinion says it was not. Rule 10 of this Court, Considerations Governing Review on Certiorari, states: "A petition for a writ or certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."

Since the Fifth Circuit was provided copies of the district court briefs in the Petition for Rehearing En Banc, and arguments of the later decided cases were made at the oral argument on December 1, 2004, in New Orleans, Louisiana, it was felt that any presumption of correctness attending the opinion could not be overcome through an argument which could only be one of erroneous factual findings or the misapplication of a properly stated rule of law, the words of Rule 10 of this Court, in a Writ of Certiorari. There were no reasons given in denying the Petition for Rehearing En Banc, other than stating that no judge requested that the court be polled on the petition. Thus, there were no other adequate means to attain the desired relief.

As to the requirement as set out in *United States v. Duell*, 172 U.S. 576, 582 (1899), the duty sought to be enforced is clear and indisputable; that is, if the Fifth

Circuit considered unconscionability, as they had a duty to do, the discussion above and citations provided compel a different result.

It is also recognized that the issuance of the writ is largely a matter of discretion with this Court, but it is felt that this is a meritorious case.

CONCLUSION

This Court should issue its writ of mandamus to the United States Court of Appeals for the Fifth Circuit to explain its refusal to consider the issue of unconscionability and direct that it do so. By granting the writ, this Court's requirement that such action would be in aid of this Court's appellate jurisdiction would be met in that the Fifth Circuit's response directly on this dispositive issue will frame the appropriate issue for any desired subsequent appeal from the lower court. It is believed that the exceptional circumstances explained in the petition warrant this Court's exercise of its discretionary powers and that it has been shown that adequate relief cannot be obtained in any form or from any other court.

Respectfully submitted,

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(Any footnotes trail end of each document)

No. 03-60870

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

WOODMEN OF THE WORLD
LIFE INSURANCE COMPANY,
Plaintiff-Counter-Defendant Appellant,

versus

ROLAND C. LEWIS,
Defendant-Third-Party Plaintiff-Counter-Claimant-
Appellee,

versus

MONARCH LIFE INSURANCE COMPANY,
Third-Party Defendant-Appellant.

December 17, 2004, Filed

COUNSEL: For WOODMEN OF THE WORLD LIFE INSURANCE COMPANY, Plaintiff-Counter-Defendant Appellant: Clifford K Bailey, III, Wells, Marbel & Hurst, Jackson, MS.

For ROLAND C. LEWIS, Defendant-Third-Party Plaintiff-Counter-Claimant-Appellee: Lawrence Elmer Abernathy, III, Abernathy Law Office, Laurel, MS; Van Douglas Gunter, Jackson, MS; John Dudeley Butler, Benton, MS.

For MONARCH LIFE INSURANCE COMPANY, Third-Party Defendant-Appellant: Clifford K Bailey,III, Jackson, MS.

JUDGES: Before REAVLEY, DAVIS, and WIENER, Circuit Judges.

OPINION: PER CURIAM: *

Plaintiff - Counter-Defendant - Appellant Woodmen of the World Life Insurance Society ("Woodmen") and Third-Party Defendant Appellant Monarch Life Insurance Company ("Monarch") appeal the district court's denial of their motion to compel arbitration. Woodmen and Monarch seek to enforce what they construe as a binding agreement to arbitrate against one of its insurance policyholders, Defendant -Third-Party Plaintiff - Counter-Claimant -Appellee Roland C. Lewis. We reverse and render.

I. FACTS AND PROCEEDINGS

Woodmen is a fraternal benefit society that provides various insurance benefits to its members. Roland Lewis is a Woodmen policyholder. In 1988, Woodmen issued two policies to Lewis: (1) a disability overhead policy that provides benefits up to $ 20,000 per month for a maximum reimbursement of $ 480,000, and (2) a disability income policy that provides maximum monthly disability income of $ 5,050. Both policies contain a provision that states, "The Articles of Incorporation and the Constitution and Laws and any amendments to them are binding on you and any beneficiary but will not take away or reduce any of the benefits of this policy."

In December 1996, Woodmen amended its Constitution to include a Problem Resolution Procedure ("PRP"). Woodmen published the PRP in the December 1997 issue of the Woodmen magazine, which is mailed to all members. The PRP was further publicized in a May-June 1999 article. Woodmen also filed the amendment with the Mississippi Department of Insurance, as required by statute. The PRP provides, in pertinent part:

Sec. 2. Resolution of Individual Disputes

(a) Purpose. The purpose of this Section 2 is to provide opportunities for members and benefit certificate owners and beneficiaries to be promptly heard and to seek fair resolution of any disputes regarding any individual rights or individual interests they have or claim to have as members, benefit certificate owners or beneficiaries. . . (b) Scope. This Section 2 shall apply whenever a member or benefit certificate owner or beneficiary of the Society makes a claim for damages, or claims any form of redress for a violation of his or her individual rights or a denial of individual privileges or benefits which he or she claims as a member or benefit certificate owner or beneficiary . . . No lawsuit may be filed against the Society or any officer, employee or agent of the Society . . . until the procedures described herein have been exhausted.

In August 1999, Lewis submitted a claim to Woodmen for disability resulting primarily from dementia. His claims under the overhead expense policy were for the full twenty-four month period provided by the policy; he continues to submit claims under the disability income policy on approximately a monthly basis.

Lewis's claims are administered by Monarch Life Insurance Company ("Monarch"), Woodmen's third-party administrator.

Woodmen n1 has paid benefits to Lewis under a reservation of rights for the entire duration of his claim because Lewis has allegedly refused to provide sufficient information to allow Woodmen to determine whether and to what extent it is liable for Lewis's benefits. Following a lengthy exchange of correspondence, in which the parties disputed their respective rights and obligations under both policies, Woodmen brought suit in the Southern District of Mississippi to compel Lewis to arbitrate his disability claims. Woodmen's pleadings contained an alternative prayer for declaratory judgment as to its liability under the policy in the event, but only in the event, that the court failed to compel arbitration. In opposing Woodmen's motion to compel arbitration, Lewis filed a counterclaim against Woodmen and a third-party complaint against Monarch in which he sought punitive and other damages for their alleged bad faith handling of his claims under both policies.

The district court, ruling only on the motion to compel arbitration, held that Woodmen's constitution required arbitration only as to claims brought by its members, not as to claims Woodmen brings itself. The court refused to compel arbitration and ruled in favor of Lewis. Woodmen timely filed its notice of appeal. n2

II. DISCUSSION

A. Motion to Compel Arbitration

1. Standard of Review

We review a district court's denial of a motion to compel arbitration de novo. n3

2. Applicable Law

The Federal Arbitration Act n4 liberally favors arbitration and establishes a strong federal policy that fosters enforcement of arbitration agreements. n5 As arbitration is a matter of contract, however, a party will not be required to submit a dispute to arbitration absent an express agreement to do so. n6 To ascertain whether such an express agreement exists, we consider (1) whether there is a valid agreement to arbitrate between the parties and (2) whether the dispute in question falls within the scope of that arbitration agreement. n7 Doubts as to whether an agreement expressly provides for arbitration are usually resolved in favor of arbitration. n8 We look to ordinary state-law principles of contract interpretation to decide whether the parties agreed to arbitrate the dispute in question. n9 If a valid agreement to arbitrate exists, we then determine whether other legal constraints foreclose arbitration. n10

Under Mississippi law, courts give undefined contractual terms their ordinary, everyday meaning. n11 Clear, unambiguous contracts are construed as written, n12 and ambiguities as to the meaning of terms are construed against the drafter. n13 In this exercise,

courts are concerned primarily with what the parties said, not what they intended, as this is the better measure of assigning meaning fairly and accurately. n14

3. The Correspondence Claims and Woodmen's Claims

The central issue here is whether the PRP requires arbitration of claims that Woodmen brings, as distinguished from claims brought by members and policy beneficiaries. Woodmen contends that the PRP, incorporated by reference into its contract with Lewis, n15 requires arbitration of all disputed claims of its policy holders and members, regardless of who initiates (or refrains from initiating) arbitration. Clearly equating the PRP's use of "claims" with "lawsuits," Lewis maintains that the plain language of the PRP requires arbitration only for claims brought - actions filed - by members or policy holders against the Society and not for claims brought by the Society against its members. n16 Woodmen counters that reading the PRP to bind Woodmen's members only and not itself is a crabbed interpretation of its procedure, which does not comport with the Woodmen's fraternal nature or with settled federal law favoring arbitration and interpreting arbitration clauses expansively.

The express language of the contract between Lewis and Woodmen requires arbitration of a member's claim when that member asserts a "claim for damages, or claims any form of redress for a violation of his or her individual rights or a denial of individual privileges or benefits which he or she claims as a member or benefit certificate owner or beneficiary." It does not, though it easily could have, refer to claims brought by Woodmen or even by "the parties." The language of the contract

consistently refers only to claims brought by members and/or beneficiaries.

Woodmen points out that Lewis repeatedly asserted claims against it between February and November 2001 in the correspondence between his counsel and Woodmen's counsel. Lewis counters by arguing that he never made a claim against Woodmen because he had no need to do so - Woodmen consistently paid his disability benefits, albeit under a reservation of rights. This is not entirely so. The correspondence in the record demonstrates, inter alia, a dispute over the timeliness of Woodmen's payment of Lewis's benefits. Lewis repeatedly asked that Woodmen tender to him the $ 5,050 in individual disability benefits that were due at the beginning of each month. Lewis also disputed Woodmen's right to have a third-party - Monarch - adjust or administer Lewis's claims. In addition, Lewis continually insisted that the "bad faith actions by Woodmen of the World cease and desist." Lewis's references to bad faith actions targeted Woodmen's repeated requests for further medical evidence to support Lewis's claims of dementia. And, Lewis asserted to Woodmen that because it was paying his benefits under a reservation of rights, it would be liable for his attorneys' fees: "Request is further made that Woodmen of the World inform Roland Lewis that it will pay all reasonable attorney's fees to date as necessitated by Woodmen of the World's continuing assertion of 'Reservation of Rights,' including possible demand for repayment."

Lewis's repeated demands in the correspondence to Woodmen fit well within the PRP's definition of "claiming any form of redress for a violation of his or

her individual rights or a denial of individual privileges or benefits which he or she claims as a member or benefit certificate owner or beneficiary." n17 We do not read the policy language - "claims for damages" or "claims any form of redress" - so narrowly as to require a legal claim, i.e., Lewis did not have to file suit first for his claims to fall within the language of the PRP. n18 Lewis's claims - his repeated requests for "redress" as a benefit policyholder - generated this protracted dispute with Woodmen. The effect of Lewis's behavior in continuing to make claims without either filing suit or invoking arbitration forced Woodmen's hand: Lewis left Woodmen no choice but to seek judicial constraint to compel arbitration of claims that it disputed with Lewis. This in turn required Woodmen to include its own claims against Lewis in the event that arbitration was not compelled.

Bearing in mind the strong federal policy in favor of arbitration, and our duty to resolve doubts of an arbitration clause's coverage in favor of arbitration, we hold that Lewis's demands clearly fall within the meaning of "claims" as used in the PRP and that the district court erred when it denied Woodmen's motion to compel arbitration. Accordingly, we reverse the district court's denial of Woodmen's motion to compel arbitration, and we render judgment compelling arbitration of the dispute between Woodmen and Lewis.

4. Counterclaim and Third-Party Complaint

Woodmen explains that the claims that Lewis now proffers in his counterclaim against Woodmen and his third-party complaint against Monarch, are the very

claims that must be arbitrated. n19 Lewis tries to avoid this by explaining that he was required by the Federal Rules of Civil Procedure to assert mandatory counter claims and third party claims in a civil proceeding, lest he risk forfeiting those claims. n20

Although the district court did not reach this issue because it denied Woodmen's motion to compel on the basis of Woodmen's claims only, we find the record before us complete as to this question. Thus, a remand would only prolong unnecessary litigation. n21 Lewis's counterclaim against Woodmen and his thirdparty complaint against Monarch, for "all sums due him under the certificates of insurance," punitive damages, and attorneys' fees, are indisputably "claims for damages" and claims for redress under the PRP. Further, Lewis has cited to no legal authority and we have found none to support the argument that an otherwise arbitrable claim becomes non-arbitrable simply because it is asserted as a compulsory counterclaim under the Federal Rules of Civil Procedure. Indeed, such a contention is illogical as well, inasmuch as these are the very "claims" that required Woodmen to seek to compel arbitration in the first place. Accordingly, Lewis must arbitrate his counterclaim and his third-party claims.

5. Unconscionability and Waiver

Lewis also argues that the PRP is unconscionable and that Woodmen waived its right to compel arbitration. As Lewis did not raise the issue of unconscionability in the district court, we will not consider it. n22 Neither shall we consider the issue of waiver. Although Lewis perfunctorily raised waiver as an affirmative defense in his answer to Woodmen's complaint, he failed to brief

the issue in his Answer to Motion to Compel Arbitration before the district court. n23

III. CONCLUSION

When we step back from Woodmen's and Lewis's individually asserted claims and analyze them in a broader context, we see that Woodmen's claims against Lewis, and Lewis's claims against both Woodmen and Monarch, are nothing more than opposite sides of the same coin. In other words, the individual claims form part of a larger, all-encompassing and protracted dispute over Lewis's claim for disability benefits that began and evolved during the correspondence between the parties. Even though we recognize that the parties, through cautious lawyering, preserved their claims judicially once Woodmen filed suit, it is not the individual claims as such that we send to arbitration but the entire dispute over Lewis's claim for benefits.

We reverse the district court's order denying Woodmen's motion to compel arbitration of its claims against Lewis and render judgment for Woodmen, compelling Lewis to arbitrate these matters. Our reversal of the district court includes reversal of its order denying Woodmen's motion to compel arbitration of Lewis's counterclaim and third-party claims, and we hold that these claims are part and parcel of the dispute to be arbitrated.

REVERSED AND RENDERED.

Footnotes

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

n1 Because Woodmen and Monarch are represented by the same counsel and advance the same claims, any reference to "Woodmen" also necessarily encompasses "Monarch."

n2 Interlocutory appeals from a district court's denial of a motion to compel arbitration are permitted pursuant to 9 U.S.C. § 16.

n3 Am. Heritage Life Ins. Co. v. Orr, 294 F.3d 702, 708 (5th Cir. 2002) (citations omitted).

n4 9 U.S.C. § 1 et. seq.

n5 Texaco Exploration & Prod. Co. v. AmClyde Engineered Prods. Co., 243 F.3d 906, 909 (5th Cir. 2001).

n6 Pers. Sec. & Safety Sys. v. Motorola, Inc., 297 F.3d 388, 392 (5th Cir. 2002).

n7 Id.

n8 Id.

n9 Webb v. Investacorp, Inc., 89 F.3d 252, 258 (5th Cir. 1996).

n10 Id.

n11 Sanderson Farms, Inc. v. Gatlin, 848 So. 2d 828, 836 (Miss. 2003).

n12 IP Timberlands Operating Co. v. Denmiss Corp., 726 So. 2d 96, 104 (Miss. 1998).

n13 Id.

n14 Sanderson Farms, 848 So. 2d at 836

n15 We reject as meritless Lewis's claim that there exists no valid agreement to arbitrate between the parties. There is no question that the PRP was incorporated into the disability policies between Woodmen and Lewis. First, both of Lewis's policies contain provisions that expressly incorporate "any amendments" - which the PRP was - to Woodmen's Articles of Incorporation and the Constitution. Second, there is no record evidence that a majority of the voting members did not approve the PRP as an amendment to the Constitution. The district court correctly determined that there exists a valid agreement to arbitrate between the parties.

n16 Lewis also attacks Woodmen's motion to compel arbitration on the merits. Specifically, Lewis argues that Woodmen did not properly invoke the procedure before asking for arbitration and that Woodmen did not comply with Lewis's request for discovery under the procedure. Woodmen correctly points out that our role is only to ascertain whether the arbitration clause covers the claims at issue, not to consider the merits of the case. See SnapO Tools Corp. v. Mason, 18 F.3d 1261,

1268 (5th Cir. 1994). Therefore, we need not consider Lewis's attacks on Woodmen's compliance with its own PRP.

n17 Emphasis added.

n18 Our conclusion is buttressed by the broad language in Section 2(a) of the PRP entitled "Purpose:" "The purpose of this Section 2 is to provide opportunities for members and benefit certificate owners and beneficiaries to be promptly heard and to seek fair resolution of any disputes regarding any individual rights . . . ." (emphasis added).

n19 A non-signatory party to an agreement may compel arbitration against a signatory party if the events in dispute are covered by the arbitration agreement. Monarch may thus properly request arbitration of Lewis's claims against it. See Texaco Exploration & Prod. Co. v. AmClyde Engineered Prods. Co., 243 F.3d 906, 909 (5th Cir. 2001).

n20 See Fed. R. Civ. P. 13(a), 14. See also Montgomery Elevator Co. v. Building Engineering Servs. Co., 730 F.2d 377, 380 (5th Cir. 1984). Rule 14 does not compel Lewis to file a third-party complaint against Monarch, though it is certainly in his interests to do so.

n21 See, e.g., Matter of Zedda, 103 F.3d 1195, 1206 (5th Cir. 1997) ("This conclusion follows as a matter of law from the undisputed documents and testimony, rendering remand for further finding unnecessary.")

n22 In re Fairchild Aircraft Corp., 6 F.3d 1119, 1128 (5th Cir. 1993) ("In short, the argument must be raised

to such a degree that the trial court may rule on it . . . The argument here was not even identified by name, much less advocated."); United States v. Drobny, 955 F.2d 990, 995 (5th Cir. 1992) ("As a general principle of appellate review, this Court will not consider a legal issue or theory not presented to the [federal district court]." (citations and quotations omitted)).

n23 Drobny, 955 F.2d at 995.

CIVIL ACTION NO. 3:02cv 182WS

IN THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

WOODMEN OF THE WORLD
LIFE INSURANCE SOCIETY
PLAINTIFF

VS.

ROLAND C. LEWIS
DEFENDANT

ROLAND LEWIS
THIRD PARTY PLAINTIFF

VS.

MONARCH LIFE INSURANCE COMPANY
THIRD PARTY DEFENDANT

ORDER

Before the court is plaintiff's motion to compel arbitration. Plaintiff here is Woodman of the World Life Insurance Society ('Woodman"), which filed this action on October 4, 2002. Now, Woodmen asks this court to order arbitration between it and defendant Roland C. Lewis under the Federal Arbitration Act, Title 9 U.S.C. §§ 1-16. n1

Woodmen is a fraternal benefit society, authorized to act in Mississippi as a representative form of

government It provides various insurance benefits to its members. Defendant Lewis is one of its policy holders. By its motion, Woodmen asks this court to compel Lewis to arbitrate his claims against Woodmen and its third-party administrator, Monarch Life Insurance Company, in accordance with Woodman's Problem Resolution Procedure as included within Woodmen's constitution. Defendant Lewis opposes Woodmen's motion to compel arbitration. Persuaded by defendants argument that the policy heroin does not require Lewis to arbitrate under the circumstance enunciated here, this court hereby denies Woodmen's motion to compel arbitration for the reasons which follow.

JURISDICTION

Woodmen filed Its complaint and motion to compel arbitration pursuant to the Federal Arbitration Act ("FAA"), Title 9 U.S.C. §§ 1, et seq. Alternatively, Woodmen seeks a declaratory judgment and other relief pursuant to the Declaratory Judgment Act, Title 28 U.S.C. §§ 2201 n2 and 2202. n3 Woodmen asserts in its complaint that this court has subject matter jurisdiction over this dispute pursuant to Title 28 U.S.C. § 1332, diversity of citizenship. Woodmen and Lewis are citizens of different states. Woodman is organized and existing under the laws of the State of Nebraska, having its principal place of business in Omaha, Nebraska. Lewis is an adult resident citizen of Mississippi. Additionally, says Woodmen, the amount in controversy in this lawsuit exceeds the sum of $75,000, exclusive of interest and costs. Agreeing with Woodmen that the parties are diverse and that the amount In controversy exceeds the statutory provision

of Title 28 U.S.C. § 1332, this court concludes that it has subject matter jurisdiction over this matter.

FACTS

On or about January 30, 1988, Woodmen Issued Lewis a disability overhead expense policy, number X4597138, which provides benefits for covered overhead expenses according to the terms and provisions of the policy. The overhead expense policy provides a maximum benefit of $20,000.00 per month for covered overhead expenses up to a maximum of $480,000.00.

On that same date, January 30, 1988, Woodmen also issued Lewis a disability income policy, number X4597137, which provides a maximum monthly disability income benefit of $5,050.00 according to the terms and provisions of the policy.

Both of Lewis' policies contain a provision which states, "The Articles of Incorporation and the Constitution and Laws and any amendments to them are binding on you and any beneficiary but will not take away or reduce any of the benefits of this policy."

In December 1996, Woodmen amended its Constitution to include a Problem Resolution Procedure. All of Woodmen's members, says plaintiff, including Lewis, were given notice of this Procedure. A copy of the Procedure was published in the January-February 1997, issue of the Woodmen magazine which was mailed to all members on or about December 27, 1996. An article in the May-June 1999, issue of the Woodmen magazine focused on Woodmen's Problem Resolution Procedure.

On or about August 31, 1999, Lewis submitted a claim for benefits to Woodmen under his insurance policies, claiming disability primarily due to a condition described as dementia. He continued to submit claims under the overhead expense policy on a monthly basis for twenty-four (24) months, the maximum benefit period provided by the policy. He has continued to submit claims under the disability income policy on an approximately monthly basis from August 31, 1999, to the present. Lewis's claims have been administered by Monarch, Woodmen's third-party administrator.

Since receiving Lewis's claim, Woodmen has paid Lewis approximately $480,000.00 in benefits under the overhead expense policy and over $133,606.67 under his disability income policy. All of these benefits have been paid under a reservation of rights, triggered, according to Woodmen, by Lewis's alleged refusal to provide the information needed by Woodmen to determine whether. and to what extent, benefits are payable under the policies. The parties, then, have a continuing dispute relating to Lewis's insurance claims.

Additionally, Lewis ties asserted a Counterclaim and Third-Party Complaint. In his Counterclaim, Lewis alleges that Woodmen committed acts of bad faith as Lewis's insurer, thereby allegedly causing Lewis to suffer sevens mental stress and psychological damages and to incur doctor and attorney fees and other costs to defend himself in this action. In his Third-Party Complaint, Lewis alleges that Monarch, Woodmen's agent, committed unlawful acts in the administration of Lewis's claim constituting negligence, gross negligence, malice, and/or reckless disregard for the rights of the insured, Lewis.

Arbitration

Pursuant to the Federal Arbitration Act, Title 9 U.S.C. § § 1 - 16, a written contract evidencing a commercial transaction to settle by arbitration a controversy arising out of that contract is valid, irrevocable and enforceable, Title 9 U.S.C. § 2. n4 A party to a valid contract who has been aggrieved by another contract party's failure to arbitrate such an agreement may file a petition in the United States District Court to compel that party to arbitrate. Title 8 U.S.C. § 4. n5 See also, Moses H Cone Memorial Hosp. v Mercury Const. Corp., 160 U.S. 1, 24, 103 S.Ct. 927, 74 I Fd. 2d 785 (1903). "[T]he FAA expresses a strong national policy in favor of arbitration[.]" Palmer v. Conseco Finance Servicing Corp., et al., 198 F.Supp. 2d 822, 824 (N.D. Miss. 2002) (citing Southland Corp. v. Keating, 465 U.S. 1, 10, 104 S.CT. 852, 857, 79 L.ED.2d 1 (1983); Mouton v. Metropolitan Life Ins. Co.. 147 F.3d 453, 456 (5th Cir. 1998). Any doubts as to the arbitrability of an issue should be resolved in favor of arbitration. id. To assist district courts in determining whether parties are compelled to arbitrate a dispute, the United States Appeals Court for the Fifth Circuit has established a two-pronged test. R.M. Perez & Assoc., Inc. v. Welch, 960 F.2d 534, 538 (5th Cir. 1992) (citing Mitsubishi Motor Corp. v. Soler Chrysler-Plymouth, 473 U.S. 614, 105 S.Ct. 3346, 87 L.Ed.2d 444 (1985).

Under the first prong of the test, the district courts must determine whether the parties agreed to arbitrate the dispute. "This determination Involves two considerations: (1) whether there is a valid agreement to arbitrate between the parties; and (2) whether the dispute in question falls within the scope of that

arbitration agreement. Palmer, 198 F.Supp.2d at 824; (citing Webb v. Investacorp, Inc.. 89 F.3d 252, 257-58 (5th Cir. 1996).

Under the second prong of the test, once the district court has made a determination that the parties agreed to arbitration, the district court must consider whether any federal statute or policy renders the claims nonarbitrable. Id., (citing Perez, 960 F.2d at 538).

In conducting the two-pronged analysis, the district court is not to weigh the merits of the underlying action. Snap-On Tools Corp. v. Mason, 18 F.3d 1261, 1267 (5th Cir. 1994). Under § 4 of the FAA, the federal district court ascertains only whether the arbitration clause covers the allegations at issue. 'if the dispute is within the scope of the arbitration clause, the court may not delve further into the merits of the dispute." L (quoting Municipal Energy Agency of Miss. v. Big Rivers Elec. Corp., 804 F.2d 338, 342 (5th Cir. 1986)).

Declaratory Judgment Act

Title 28 U.S.C. § § 2201 (a) provides that where an actual controversy exists, a district court "may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such." n6 When determining whether to grant a declaratory judgment, the district court must consider a three-step inquiry. First, the court must determine whether the declaratory action is justifiable. Orix Credit Alliance. Inc.. v. Wolfe, 212 F.3d 891, 895 (5th Cir. 2040). The justiciabililty of an action is

determined by whether an "actual controversy" exists between the parties to the action (citing Rowan Companies, Inc., v. Griffin, 876 F.2d 26, 27-28 (5th Cir.1989)). "As a general rule, an actual controversy exists where'a substantial controversy of sufficient immediacy and reality [exists] between parties having adverse legal interests."' Orix Credit Alliance. Inc., 212 F.3d at 896 (quoting Middle South Energy Inc. v City of New Orleans, 800 F.2d 488, 490 (5th Cir. 1986).

Secondly, once a court determines there exists a controversy between the parties such that the court has subject matter jurisdiction, then the court's next inquiry is "whether it has the 'authority' to grant declaratory relief in the case presented." Orix Credit Alliance, Inc., 212 F.3d at 895 (citing Travelers Ins Co. v Louisiana Farm Bureau Fed'n, Inc., 896 F.2d 774, 776 (5th Cir. 1993).

Thirdly, "the court has to determine how to exercise its broad discretion to decide or dismiss a declaratory judgment action-" Orix Credit Alliance. Inc., 212 F.3d at 895 (citing Travelers Ins. Co., 996 F.2d at 778).

Discussion

The policy provisions at issue are set out below:

(c) Procedures. A member or benefit certificate owner or beneficiary seeking to initiate the problem resolution procedure of this Section 2 shall contact the designated Problem Resolution Officer of the Society, who shall assist the member or benefit certificate owner or beneficiary in requesting and arranging for the following problem resolution steps:

Step 1. Information negotiation arranged by the Problem Resolution Officer, involving the member or benefit certificate owner or beneficiary and officials of the Society as appropriate to the dispute.

Step 2. If step 1 does not result in a mutually satisfactory resolution, mediation administered by and in accordance with the applicable mediation rules of the American Arbitration Association (or another neutral organization mutually agreed upon).

Step 3. If step 2 does not result in a mutually satisfactory resolution, arbitration administered by and in accordance with the applicable arbitration rules of the American Arbitration Association (or another neutral organization mutually agreed upon). The arbitrator may award any and all damages or other relief allowed for the claim in dispute by applicable federal or state law, excluding attorneys fees unless otherwise required by applicable law. Unless (and to the extent) prohibited by applicable law with respect to the issue in dispute, the decision of the arbitrator shall be final and binding, subject only to the right to appeal such decision as provided in the arbitration rules and applicable law.

Policy X4597136 clearly provides for arbitration. indeed, arbitration is a part of the Problem Resolution Procedures. As above shown, arbitration is a final remedy offered to the parties once Step 1 and Step 2 have been exhausted. The initiation of the Problem Resolution Procedures, however, can only be commenced by the insured. Section two of Article IX: Problem Resolution Procedures, Is applicable to "all

current and future members and to all current and future benefits certificates" and has as its purpose to

"provide opportunities for members and benefit certificate owners and beneficiaries to be promptly heard and to seek fair resolution of any disputes regarding any individual rights or individual intereststhey have or claim to have ..."

Moreover, the policy provision, Problem Resolution Procedures of Section 2 "shall apply whenever a member or benefit certificate owner or beneficiary of the Society makes a claim for damages, or claims any form of redress for violation of his or her Individual rights or denial of individual privileges or benefits which he or she claims as member or benefit certificate owner or beneficiary."

Woodmen attempts to Initiate arbitration by filing this action; however, the Woodmen/Lewis policy does not provide such redress for the insurer, just the insured. The Problem Resolution Procedures does not allow the insurer to initiate any of the procedures. The language of subsection (c), "Procedures," clearly makes the point: "A member or benefit certificate owner or beneficiary seeking to initiate the problem resolution procedure of this Section 2 shall contact the designated Problem Resolution Officer of the Society, who shall assist the member or benefit certificate owner or beneficiary in requesting and arranging for the. . . resolution steps." (Emphasis added).

Therefore, this court must deny Woodmen's motion to compel arbitration inasmuch as Woodmen has no right under the policy to initiate such proceedings. Lewis

reminds the court that he has not exhausted any of the remedies as provided for under the policy. Lewis has not sought to initiate the Problem Resolution Procedures of his policy, perhaps because to date, Woodmen has not denied Lewis' claim to the proceeds of the policies.

Conclusion

Accordingly, this court denies Woodmen's motion to compel arbitration. The court further denies Woodmen's alternative motion for declaratory judgment at this time. In its alternative motion for declaratory relief; Woodmen asks this court to enter judgment declaring the parties' rights under the policies. This motion needs more development; Woodmen devoted almost all of its energy on the matter of arbitration. Accordingly, Woodmen, if it still feels it has a basis to do so, may refile this motion within fifteen (15) days of the filing of this order.

SO ORDERED AND ADJUDGED, this the 30th day of September, 2003.

United States District Judge

Footnotes

n1 The purpose of the FAA can be found in Title 9 U.S.C. § 2 which provides that

[a] written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to

perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

n2 Title 28 U.S.C. § 2201 provides in pertinent part

[A]ny court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any Interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be raviewable as such.

n3 Title 28 U.S.C. § 2202 provides that

[f]urther necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment.

n4 Title 9 U.S.C. § 2 provides that

[a] written provision in any maritime transaction or a contract evidencing a transaction involving commence to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable,

save upon such grounds as exist at law or in equity for the revocation of any contact.

n5 Title 9 U.S.C. § 4 provides in pertinent part that

[a] party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement.

n6 Title 28 U.S.C. § 2201 (a) provides in pertinent part that

[i]n a case of actual controversy within its jurisdiction . . . any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

No. 03-60870

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

WOODMEN OF THE WORLD
LIFE INSURANCE COMPANY,
Plaintiff-Counter-Defendant Appellant,

versus

ROLAND C. LEWIS,
Defendant-Third-Party Plaintiff-Counter-Claimant-
Appellee,

versus

MONARCH LIFE INSURANCE COMPANY,
Third-Party Defendant-Appellant.

February 21, 2005, Filed

ON PETITION FOR REHEARING EN BANC

Before: REAVLEY, DAVIS, and WIENER, Circuit Judges.

PER CURIAM

Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En

Banc (Fed. R. App. P. and 5th Cir. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

United States District Judge

CIVIL ACTION NO. 3:02cv 182WS

IN THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

WOODMEN OF THE WORLD
LIFE INSURANCE SOCIETY
PLAINTIFF

VS.

ROLAND C. LEWIS
DEFENDANT

ROLAND LEWIS
THIRD PARTY PLAINTIFF

VS.

MONARCH LIFE INSURANCE COMPANY
THIRD PARTY DEFENDANT

REBUTTAL MEMORANDUM IN SUPPORT OF
MOTION TO COMPEL ARBITRATION

Lewis's Memorandum does not contain any credible factual or legal basis for denying Woodmen's n1 Motion to Compel Arbitration. For the masons discussed below, Lewis's arguments are without merit and the Motion to Compel Arbitration should be granted.

1. Woodmen May Invoke the Society's Problem Resolution Procedure

Lewis's contention that Woodmen may not invoke the Society's Problem Resolution Procedure ("PRP") is contrary to law and contrary to the terms and intent of the PRP. It is clear from the language of the PRP that it is intended to provide a way for Woodmen and its members to resolve disputes in a manner "consistent with the fraternal nature of the Society and without the delay and expense of formal legal proceedings." (Motion - Exhibit E, Sec. 2(a)). The PRP applies to all types of disputes between Woodmen and its members, including Lodge disputes n2 and individual disputes, which includes disputes regarding claims for benefits. The PRP expressly states that it "shall apply whenever a member or benefit certificate owner or beneficiary of the Society makes a claim for damages, or claims any form of redress for a violation of his or'her individual rights or a denial of individual privileges or benefits which he or she claims as a member or benefit certificate owner or beneficiary. n3 Although the PRP is provided to members as a way to efficiently resolve disputes, it is not expressly limited to members. Nowhere does the PRP state that it may be invoked only by members or that it may not be invoked by Woodmen.

There is also a practical reason why Woodmen should be allowed to invoke the PRP, as this case illustrates. Between August 1999 and the date this suit was filed, Lewis claimed $480,000 in overhead expenses and over $ 133,000 in disability income benefits. During this time numerous questions arose about Lewis's claims - not only his overhead expenses, but also about the nature

and extent of his claimed disability. Evidence of the parties' dispute is contained in correspondence exchanged by counsel before this suit was filed, copies of which are attached to Woodmen's Supplemental Exhibits as Exhibit J. Lewis's counsel repeatedly "claimed [a] form of redress for a violation of his ... individual rights or a denial of individual privileges or benefits which he ... claims as a member or benefit certificate owner or beneficiary."

The parties clearly have the type of dispute contemplated by Woodmen's PRP. In fact, Woodmen and Lewis exchanged correspondence regarding the PRP over a period of months. (A copy of the parties' correspondence relating to the PRP is attached to the Supplemental Exhibits as Exhibit K.) However, no progress was made convincing Lewis that Woodmen's Problem Resolution Procedure was even applicable. It was readily apparent that Woodmen would be required to file suit to compel arbitration.

The only reason Lewis has not invoked the PRP (or attempted to file suit against Woodmen and/or its third party administrator) is because Woodmen elected to pay him benefits under reservation of rights while it attempted to obtain information which hopefully would resolve its questions about the claim.

Lewis now seeks to penalize Woodmen for giving him the benefit of the doubt and trying to resolve the parties' dispute on an amicable and informal basis. If, as Lewis contends, only a member of the Society may invoke the PRP, then Woodmen has only one option when there is a dispute about a claim - refuse to pay benefits and force the member into invoking the PRP.

Such an interpretation exalts form over substance and does so to the detriment of Woodmen's members. The payment of benefits under a reservation of rights is obviously better for the member than a claim denial.

Even if Lewis's argument had merit at the time this suit was filed, it is disingenuous, to say the least, for him to assert that he has no dispute with Woodmen and Monarch in light of the Counterclaim and Third Party Complaint he filed in this action. Lewis's Counterclaim and Third Party Complaint clearly "make a claim for damages, or claim [a] form of redress for a violation of his ... individual rights or a denial of individual privileges or benefits which he ... claims as a member or benefit certificate owner or beneficiary." A copy of the Counterclaim filed by Lewis in this action, as amended, is attached hereto for convenient reference. An examination of Lewis's claims, particularly the allegations of paragraph 10 of the Counterclaim, leaves no doubt that the parties have a dispute within the purview of Woodmen's Problem Resolution Procedure.

As discussed in Woodmen's initial Memorandum, the Court should "'resolve doubts concerning the scope of coverage of an arbitration clause in favor of arbitration.'" Personal Security & Safety Systems, Inc. v. Motorola, Inc., 297 F.3d 388, 392 (5th Cir. 2002) (quoting Neal v. Hardee's Food Systems, Inc., 918 F.2d 34, 37 (5th Cir. 1990)). Therefore, "a valid agreement to arbitrate applies 'unless it can be said with positive assurance that [the] arbitration clause is not susceptible of an interpretation which would cover the dispute at issue.'" Motorola, 297 F.3d at 392 (quoting Neal, 918 F.2d at 37).

Motorola is a good example of how broadly arbitration clauses are construed. In Motorola the Fifth Circuit compelled arbitration of a dispute under a Stock Purchase Agreement based on the arbitration provision in a separate Product Development Agreement between the same parties. The Court held "that, where the parties include a broad arbitration provision in an agreement that is 'essential' to the overall transaction, we will presume that they intended the clause to reach all aspects of the transaction." 297 F.3d at 394. Because the Court could not say "with positive assurance that [the] arbitration clause is not susceptible of an interpretation which would cover the dispute at issue," it found that the arbitration clause applied. Id. at 395.

The holding and underlying principles of Motorola are fully applicable to the present case. Woodmen's Problem Resolution Procedure cannot reasonably be construed to exclude the parties' present dispute about Lewis's claim. There clearly is no basis for the Court to state with "positive assurance" that the parties' dispute is not covered by the PRP.

II Woodmen Has Not Breached the Terms of the Problem Resoluton Procedure

Lewis also contends that Woodmen breached the terms of the PRP by failing to request Step 1 of the PRP (informal negotiation) and Step 2 (mediation) before seeking Step 3 (arbitration) and by allegedly refusing Lewis's request for discovery allowed by the PRP. These are both specious arguments.

Woodmen filed this action to compel arbitration because it had no reasonable basis for believing that

informal negotiation or mediation would be helpful. Based on Lewis's continued refusal to provide the information requested by Woodmen on several occasions before suit was filed, it was genuinely believed that informal negotiation And/or mediation would be futile. (See correspondence in Supplemental Exhibit J) Woodmen has no objection to attempting informal negotiation through a Problem Resolution Officer andlor mediation before proceeding to arbitration so long as Lewis participates in a meaningful way. To date, however, he has shown no willingness to compromise on the particular issues in dispute.

Lewis's assertion'that Woodmen "materially breached" the PRP 'by refusing to provide discovery of information as required' is also misplaced. The "discovery" he is referring to consist of Lewis's Notice of a 30(b)(6) Deposition of Woodmen, designating 20 areas of inquiry, and his Notice of Deposition of two individuals involved in processing his claims. These Notices were both filed in this action, before Lewis filed an Answer to Woodmen's Complaint. The undersigned counsel for Woodmen advised Lewis's counsel that Woodmen objected to any discovery (by any party) before the Court ruled on the arbitration issue. If the case is ultimately ordered to arbitration, then any necessary discovery should be conducted in the arbitration proceeding. Woodmen's objection to Lewis's requested litigation discovery does not constitute a refusal to provide discovery pursuant to the Problem Resolution Procedure. Lewis is, in effect, attempting to use Woodmen's insistence that discovery be conducted within the PRP as evidence that Woodmen breached the PRP. Lewis's argument makes no sense.

Lewis, not Woodmen, breached the Problem Resolution Procedure by refusing to voluntarily participate in the PRP and by filing his Counterclaim and Third Party Complaint in this action. As Lewis states in his Memorandum (p. 6), a party may not breach a contract and at the same time insist upon its performance. Likewise, Lewis cannot repudiate Woodmen's PRP on one hand and allege that Woodmen violated it on the other.

Therefore, there is no factual or legal basis for Lewis's contention that Woodmen violated the Problem Resolution Procedure. Woodmen does not object, and has never objected, to Lewis obtaining discovery of relevant information pursuant to Woodmen's Problem Resolution Procedure. It does object to conducting "litigation discovery" until the Court rules on the Motion to Compel Arbitration. Woodmen's position does not constitute a breach of the PRP. It clearly is not a legally sufficient basis for denying Woodmen's Motion to Compel Arbitration. If the parties' dispute is subject to arbitration, then it should be arbitrated. If Lewis believes the PRP has been violated, any such violations can be addressed in the arbitration proceeding.

III. Woodmen's Amendment Including the Problem Resolution Procedure Is Valid and Binding on Lewis

Lewis's attempts to attack the validity of Woodmen's Amendment to its Constitution and Laws, which included the Problem Resolution Procedure, are also without merit.

As Lewis acknowledges, the Amendment was adopted in December, 1996. This was almost three years before he initially submitted his claim for benefits. n4 Therefore, any argument that the Amendment may not be applied retroactively (even if valid), is not applicable to Lewis's claim.

Lewis's complaints about the alleged "unconscionability" of the Amendment also have no basis in fact or law. As discussed in Woodmen's initial Memorandum, the Amendment was adopted in accordance with Woodmen's Constitution and Laws and the applicable statutes of the State of Mississippi governing fraternal benefit societies. By statute, Miss. CODE ANN. § 83-29-13 n5, the Amendment governs and controls the parties'. agreement in all respects the same as though it had been adopted prior to Lewis's membership in Woodmen. Other than complaining about § 83-29-13 being passed in 1930, Lewis ignores the statute in his Memorandum. He makes no attempt to explain why the Amendment should not be enforced as required by the statute. The date the statute was passed obviously has no effect on its validity. Even if it did, the argument loses force in this case because, as discussed in Woodmen's initial Memorandum, the applicable fraternal benefits society statutes were re-adopted by the Mississippi Legislature in 2001 without any significant changes relevant to this action.

Lewis's complaint about the balloting in favor of the Amendment is also without merit. He produced no evidence to refute the Affidavit of James L. Mounce n6 or to otherwise show that the Amendment was adopted in violation of Woodmen's Constitution and Laws or the applicable laws of the State of Mississippi. He basically

attempts to twist certain facts contained in Mounce's affidavit to suggest that the Amendment was adopted by a very small number of people. The "226 eligible voters" referred to by Lewis (on page 10 of his Memorandum) are not merely members of the Society; they are the delegates to Woodmen's national convention. They are the representatives of all of Woodmen's lodges and they function like a legislative body. As set forth in Mounce's Affidavit, there were a total of 226 delegates; 205 ballots were returned; 204 voted in favor of the Amendment; and 1 voted against the Amendment. The implication by Lewis that Woodmen's delegates could not validly adopt the Amendment is like challenging a Mississippi statute because it was only approved by 100 members of the Mississippi Legislature.

As the Fifth Circuit stated in American Heritage Life Ins. Co. v. Orr, 294 F.3d 702, 710 (5th Cir. 2002), a party contesting the "making" of an arbitration agreement must "make at least some showing that under prevailing law, he would be relieved of his contractual obligations to arbitrate if his allegations proved to be true ... (and) produce some evidence to substantiate his factual allegations." Lewis has made no such showing and produced no such evidence to substantiate his objections to Woodmen's Amendment in this case.

The Mississippi state court authorities relied upon by Lewis, primarily East Ford, Inc. v. Taylor, 2002 WL 1584301 (Miss. July 18, 2002), are distinguishable and not applicable to this case. Lewis cannot reasonably contend that the Woodmen Amendment is "procedurally' unconscionable when it was authorized and adopted in accordance with the Mississippi statutes

governing fraternal benefit societies and given full effect by these same statutes. He also cannot complain that the Amendment is "substantively" unconscionable (which according to East Ford means "oppressive") when the Amendment does not attempt to limit the substantive terms of Lewis's policies or reduce his entitlement to benefits. It merely attempts to provide an efficient and inexpensive method for the parties to resolve any disputes that may arise under the policies.

Therefore, there is no basis for finding the Woodmen Amendment to be either procedurally or substantively unconscionable. The Amendment was validly adopted in accordance with Mississippi law and should be enforced in this case.

IV. Woodmen Has Not Waived It's Right to Compel Arbitration

Finally, Lewis contends that Woodmen waived its right to compel arbitration by filing this action. This contention is also contrary to the evidence, contrary to law and should be rejected.

The Federal Arbitration Act specifically authorizes an action, like this one, to compel arbitration. The Act expressly provides that, subject to the requirements for federal jurisdiction, "[a] party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court ... for an order directing that such arbitration proceed in the manner provided for in such agreement." 9 U.S.C. § 4.

In accordance with the FAA, Woodmen filed its Complaint in this case specifically requesting an order compelling arbitration. Lewis's attempt to re-characterize this action as a suit for declaratory judgment is contrary to the allegations of Woodman's Complaint. The Complaint requested a declaratory judgment only as alternative relief, in the event the Court determines that the parties' dispute is not subject to arbitration.

Lewis's suggestion that Woodmen should have filed a motion, rather than a complaint, is also not credible. Fed.R.Civ.P. 3 states, "A civil action Is commenced by filing a complaint with the court." Rule 7(b) states, "An application to the court for an order shall be by motion..." It may be elementary, but a motion can only be filed in an action which has been commenced by filing a complaint.

"There is a strong presumption against waiver of arbitration." Subway Equipment Leasing Corp. v. Forte, 189 F.3d 324, 326 (5th Cir. 1999) Since any doubts concerning the scope of arbitrable issues are resolved in favor of arbitration, "a party alleging waiver of arbitration must carry a heavy burden." Id. According to the Fifth Circuit, in order to waive its right to arbitration a "party must have litigated the claim that the party now proposes to arbitrate." Id. at 328-29. The party must "at the very least, engage in some overt act in court that evinces a desire to resolve the arbitrable dispute through litigation rather than arbitration." Id. at 329.

A good illustration of the difficulty of proving waiver is Walker v. I.C. Bradford & Co., 938 F.2d 575 (5th Cir.

1991). In Walker, the plaintiffs' sued the defendants for securities violations. Instead of immediately demanding arbitration, the defendants answered the complaint and participated in discovery. Thirteen months later the defendants sought to enforce their contractual right of arbitration. Despite the defendants' delay and participation in the judicial process, the Fifth Circuit held that the defendants had not waived arbitration because the plaintiffs had not shown that they were "materially prejudiced" by the delay. Id. at 578.

Lewis cannot credibly contend that Woodmen waived its right to arbitration merely by filing a complaint to compel arbitration, which is specifically authorized by the Federal Arbitration Act. His argument borders on the ridiculous in light of the Fifth Circuit's requirements for proving waiver.

V. Lewis Makes No Meaningful Attempt to Respond to the Decisions of Other Courts Upholding Woodmen's Problem Resolution Procedure

As discussed in Woodmen's initial Memorandum, a number of other Courts have upheld the validity of the Society's Amendment adopting the Problem Resolution Procedure and compelled arbitration in situations not materially different from the present case. Although Lewis claims he could not find most of these decisions, they were all cited in full and all but possibly two are reported decisions. If Lewis was unable to locate these decisions, they would have been provided on request. In any event, Lewis's attempt to distinguish these cases on the grounds that they involved a suit initially filed by the member is without merit, as discussed above.

Conclusion

Lewis has produced no evidence and no credible legal argument why Woodmen's Problem Resolution Procedure should not be enforced. Accordingly, the Motion to Compel Arbitration should be granted and the Court should enter an order compelling arbitration of all disputes between the parties relating to Lewis's claims for overhead expense and disability income benefits pursuant to his Woodmen policies.

Respectfully submitted,

WOODMEN OF THE WORLD LIFE
INSURANCE SOCIETY AND MONARCH LIFE
INSURANCE COMPANY

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Footnotes

n1 For convenience and where applicable, references to 'Woodman' include Monarch Life Insurance Company.

n2 The provisions relating to Lodge disputes quoted on pages 3-4 of Lewis's Memorandum are not relevant to the present dispute.

n3 For convenience, "members", 'benefit certificate owners' and "beneficiaries' of the Society, as used in the Problem Resolution Procedure, will be referred to collectively as "members".

n4 According to Lewis's attached Counterclaim he became disabled in August
1999.

n5 The statute is quoted on pages 45 of Woodmen's initial Memorandum.

n6 Attached to Woodmen's Motion to Compel Arbitration as Exhibit D.

CIVIL ACTION NO. 3:02cv 182WS

IN THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

WOODMEN OF THE WORLD
LIFE INSURANCE SOCIETY
PLAINTIFF

VS.

ROLAND C. LEWIS
DEFENDANT

ROLAND LEWIS
THIRD PARTY PLAINTIFF

VS.

MONARCH LIFE INSURANCE COMPANY
THIRD PARTY DEFENDANT

DEFENDANT'S RESPONSE TO MEMORANDUM
IN SUPPORT OF MOTION TO COMPEL
ARBITRATION

Plaintiff filed its law suit against its policyholder asking not only for arbitration, but also, according to its Complaint, for declaratory judgment pursuant to 28 U.S.C. Secs. 2201 and 2202, "...declaring the parties' rights under the policies, including Lewis' right, if any, to benefits, and awarding Woodmen all damages to which it is entitled by law, including reimbursement for all benefits paid to Lewis, prejudgment interest,

attorney's fees and costs." The Complaint states that it has already paid Lewis approximately $480,000.00 under his overhead expense policy and $133,606.67 under his disability income policy. The overhead expense policy in now fully paid as it was for a period of two years, which has now expired. His disability income policy continues to be paid under a reservation of rights at $5,050.00 per month, an income he is supposed to receive until he is 65 years old. Lewis was born in 1943. Therefore, this action demands over half a million dollars, plus any additional amount paid to him since filing suit. Of course, plaintiff also asks that any further payment to Lewis be terminated. Plaintiff's action is not an ordinary motion for arbitration, it is a choice made by plaintiff to waive arbitration, if it ever had the right to demand arbitration, as will be discussed later in this brief.

I. Facts

On January 30, 1988, Woodmen of the World Life Insurance Society issued two policies insuring Roland C. Lewis, then a 44 year old plaintiff's trial lawyer, against total disability should he become unable to do the substantial and material duties of his regular occupation due to sickness or injury. The maximum policy benefits under the respective policies were $5,050.00 per month from the first day of total disability until the 65th birthday of the insured, and, overhead up to $20,000.00 per month commencing on the 61st day of total disability, payable for 24 months, with a maximum of $480,000.00. The policy premiums, respectively, were monthly charges of $199.34 and $232.20, for a total monthly premium of $431.54 ($5,178.48. annually) payable in advance until the 65th birthday of the insured

for a total premium of approximately $108,740.00. The policies contained a waiver of premium in case of total disability.

Lewis timely paid each and every premium for both policies as and when they became due, from February 1, 1988 until November, 1999, for a total paid premium of approximately $60,847.14. After Lewis became totally disabled, Woodmen approved the contractual premium waiver (without reservation of rights) for which he had paid, and, upon request by Lewis, returned approximately $1,294.62 in premium overpayments. Therefore, the premiums paid were from the date of issuance until the date of total disability, August 18, 1999, the date Social Security determined Lewis was entitled for total disability benefits, minus the twelve month waiting period.

When Lewis bought the policies, they allowed legal action against Woodmen 60 days after the required proof of loss was provided, but not more than 3 years after the time for giving proof of loss. There was no mention of arbitration at that time, nor when Woodmen started paying benefits under reservation of rights. Woodmen never requested implementation of its "Problem Resolution Procedure" contained in the amendment to Woodmen's Constitution, and not even when it filed its Complaint. Lewis never requested arbitration.

II. Law

What Plaintiff fails to recognize in its Complaint, Motion and brief is that it has no right to demand arbitration because the amendment it so strongly

advocates does not grant Woodmen the power to make such a demand. A cursory reading of the Dispute Resolution Procedure clearly reveals that only the insured can make a request to invoke that provision. The entire amendment is found in Plaintiff's Motion to Compel Arbitration, Exhibit "E." Salient portions of the amendment are:

ARTICLE IX

Problem Resolution Procedures

Sec. 1. Resolution of Lodge Disputes.

(A) Purpose. The purpose of this Section 1 is to identify the means by which ***members*** may present and resolve grievances involving lodge matters, or charges against other members, consistent with the fraternal nature of the Society and the role of the fraternal lodge system in fulfilling the common bond and purpose of the Society.

(B) Scope. This Section 1 shall apply whenever a ***member*** has a grievance involving lodge matters; or wishes to initiate charges against any other ***member*** believed to have violated this Constitution and Laws or the lodge By-Laws, or to have engaged in conduct detrimental to the best interests of the lodge or of the

Society...This Section 1 shall not apply, and Section 2 shall apply, whenever the matter in dispute involves a Member's or benefit certificate owner's or beneficiary's claim for damages, ...

Sec. 2. Resolution of Individual Disputes

(A) Purpose. The purpose of this Section 2 is to provide opportunities for ***members and benefit certificate owners and beneficiaries*** to be promptly heard and to seek fair resolution of any disputes regarding any individual rights or individual interests they have or claim to have as members, benefit certificate owners or beneficiaries, consistent with the fraternal nature of the Society and without the ***delay and expense of formal legal proceedings.*** This Section 2 is intended to apply to all current and future members and to all current and future benefit certificates.

(B) Scope. ***This Section 2 shall apply whenever a member or benefit certificate owner or beneficiary of the Society makes a claim for damages, or claims any form of redress for a violation of his or her individual rights or a denial of individual privileges or benefits which he or she claims as a member or benefit certificate owner or beneficiary. This includes, but is not limited to, disputes involving alleged fraud, misrepresentation, discrimination, denial of civil rights, conspiracy, defamation, or infliction of distress by the Society or any officer, employee or agent of the Society; and includes***

disputes regarding the denial of benefit claims under any certificate to the extent the procedures of the Section 2 are not prohibited by applicable law. No lawsuit may be filed against the Society or any officer, employee or agent of the Society on any dispute covered by this Section 2 until he procedures descried herein have been exhausted; and a lawsuit may then be filed only if the applicable law does not recognize the procedures herein to be final and binding with respect to the matter in dispute...

(Emphasis added)

A reading of the entire amendment will show that the whole procedure is intended to be an option for the insured *if that insured has a dispute with Woodmen.* Lewis had no dispute with Woodmen, and did not invoke the procedures because he was being paid under the policies, *albeit* under reservation of rights, about which he was inquiring in numerous communications with Woodmen and supplying literally pounds of medical reports and documentation.

Woodmen apparently contends that it has a right to invoke the Dispute Resolution Procedure, but the clear language does not give it that option. Indeed, Woodmen has not even complied with the procedure set out in the amendment, *i.e.*, there has been no request for informal negotiation to be arranged by the Problems Resolution Officer as provided in Step 1, and failing those negotiation, a request for mediation as set out in Step 2.

Also, Woodmen has further failed to comply with the dictates of the amendment by refusing to provide discovery of information as required. Continuing quoting the amendment from above:

> (C) Procedures. ***A member or benefit certificate owner or beneficiary*** seeking to initiate the problem resolution procedure of this Section 2 shall contact the designated Problem Resolution Officer of the Society, who shall assist the member or benefit certificate owner or beneficiary in requesting and arranging for the following problem resolution steps:
>
> > Step 1. **Informal negotiation** arranged by the Problem Resolution Officer, involving the member or benefit certificate owner or beneficiary and officials of the Society as appropriate to the dispute.
> >
> > Step 2. If step 1 does not result in a mutually satisfactory resolution, **mediation** administered by and in accordance with the applicable mediation rules of the American Arbitration Association (or another neutral organization mutually agreed upon).
> >
> > Step 3. If step 2 does not result in a mutually satisfactory resolution, **arbitration** administered by and in accordance with the applicable arbitration rules of the American Arbitration Association (or another neutral

> organization mutually agreed upon). The arbitrator may award any and all damages or other relief allowed for the claim in dispute by applicable federal or state law, excluding attorneys fees unless otherwise required by applicable law. Unless (and to the extent) prohibited by applicable law with respect to the issue in dispute, the decision of the arbitrator shall be final and binding, subject only to the right to appeal such decision as provided in the arbitration rules and applicable law.

The member or benefit certificate owner or beneficiary shall have the right to consult with legal counsel of his or her choosing at any time; and throughout steps 2 and 3, shall have the right to be directly represented by legal counsel, **shall have reasonable access to and discovery of relevant information,** and shall have reasonable notice of the dates and times of the mediation and arbitration meetings. **Additional procedural rules may be defined in policies established by the Society and made available to any member or benefit certificate owner or beneficiary upon request**...

By refusing to allow discovery, as required by the amendment, Woodmen has committed **material breaches** of the very contract with it claims was designed to assist in problem resolution. The paragraph immediately following Step 3 states in unambiguous terms that the "...**the certificate owner...shall have reasonable access to and discovery of relevant information**..."

Depositions have been noticed and discovery requested. Exhibit "A". Woodmen has steadfastly refused to provide either requested information or discovery and has refused to sit for deposition. These are material breaches of the contract. This alone should render null and void the arbitration "agreement." The law is clear, a party may not breach a contract and at the same time insist upon its performance or a portion thereof.

In *White Hawk Ranch, Inc., v. Hopkins, 1998 WL 94830, (N.D.Miss 1998)* the court held:

> A party may not insist on the performance of a contract **or a provision thereof** where he himself is guilty of a material or substantial breach of that contract or provision.

UHS-Qualicare, Inc., v. Gulf Coast Community Hosp., 525 So. 2d 746, 756 states:

> Materiality is ordinarily a question of fact, e.g., *Hensley v. E.R. CarpenterCo.*, 633 F.2d 1106, 1110 (5th Cir. 1980), albeit one of ultimate fact, not evidentiary fact. The standard for determining materiality must necessarily be both 'imprecise and flexile' to 'further the purpose of securing for each party his expectation of an exchange of performances.' *Restatement (Second) of Contracts Se . 241 comment A (1981).*
>
> Our general rule is that a party to a contract may not take advantage of its own act

> or omission. *Dawson's Dependents v. Delta Western Exploration Co.*, 147 So. 2d 485, 487 (1962); *Callon Petroleum Co. v. Big Chief Drilling Co.*, 548 F. 2d 1174, 1178 (5th Cir. 1977).

UHS-Qualicare, Inc. v. Gulf Coast Community Hosp., 525 So. 2d 758, 761, states:

> ...we have followed the general rule that if one contracting party commits a material breach, the other party is excused from further performance.

Matheney v McdClain, 161 So. 2d 516, 520 .

Not one word of the amendment empowers or requires Woodmen to arbitrate their claims against a member or benefit certificate owner or beneficiary, which seems to be a good reason that Woodmen did not attempt to initiate arbitration procedures. Their own policies and procedures allow Woodmen to seek court action, as they have, while at the same time barring their members from filing suit. This arbitration clause shields Woodmen from its own potential negligence, as the arbitration clause pertains to claims of only the member and benefits only Woodmen.

The amendment was adopted on December 10, 1996. At this time, Lewis was already suffering the effects of the conditions which would render him totally disabled. He did not have a meaningful choice among other disability insurers. There certainly was a lack of voluntariness on his part, with this contract of adhesion which was altered without his knowledge, consent, signature or approval. There was great imbalance in

the parties' relative bargaining power, the stronger party's terms were unnegotiable, and Lewis was prevented by market factors, timing or other pressures from being able to contract with another party on more favorable terms or to refrain from contracting at all.

In *East Ford, Inc. v. Taylor*, 2002 Miss. LEXIS 212 (Miss. 2002) Mississippi law in this area was settled. Only two other subsequent Mississippi decisions on arbitration were found, *Banks v. City Finance Company*, 825 So.2d 642 (Ms. Sup. Ct. Sept. 5, 2002), which dismissed the appeal for lack of jurisdiction, and *Russell v. Performance Toyota, Inc.*, 826 So.2d 719 (Ms. Sup. Ct. Sept. 19, 2002), which found the facts easily distinguishable from *East Ford*.

East Ford clearly sets out understandable analyses on the substantive law relating to the requirements of arbitration agreements in Mississippi. The decision states: "In determining the validity of a motion to compel arbitration under the Federal Arbitration Act, courts generally conduct a two-pronged inquiry. The first prong has two considerations: (1) whether there is a valid arbitration agreement and (2) whether the parties' dispute is within the scope of the arbitration agreement." *Id.*

The Court continued:

> Under the second prong, the United States Supreme Court has stated the question is 'whether legal constraints external to the parties' agreement foreclosed arbitration of those claims.' *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc.*, 473 U.S. 614, 105 S. Ct.

> 3346, 87 L. Ed. 444 (1085) (citations omitted). **Under the second prong, applicable contract defenses available under state contract law such as fraud, duress, and unconscionability may be asserted to invalidate the arbitration agreement without offending the Federal Arbitration Act**. *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 686, 116 S. Ct. 1652, 134 L.Ed. 2d 902 (1996).

Id., (Emphasis added)

Further:

> It has been recognized that in order to determine whether legal constraints exist which should preclude arbitration, 'courts generally...should apply ordinary state-law principles that govern the formation of contracts.' *Bank One, N.A. v. Coates*, 125 F. Supp. 2d 819, 827 (S.D. Miss. 2001)(quoting Webb v. Investacorp, Inc., 89 F.3d 252, 257 (5th Cir. 1996)...**In other words, the usual defenses to a contract such as fraud, unconscionability, duress, and lack of consideration may be applied to invalidate an arbitration agreement, so long as the law under which the provision is invalidated is not applicable only to arbitration provisions**...

Id. (Emphasis added)

The Court continued:

> The Courts have recognized 'two types of unconscionability, procedural and substantive.' *Pridgen v. Green Tree Fin. Servicing Corp.*, 88 F.Supp.2d (S.D. Miss. 2000) (quoting *York v. Georgia-Pacific Corp.*, 585 F.Supp. 1265, 1278 (N.D. Miss 1984)). **Procedural unconscionability may be proved by showing 'a lack of knowledge, lack of voluntariness, inconspicuous print, the use of complex legalistic language, disparity in sophistication or bargaining power of the parties and/or a lack of opportunity to study the contract and inquire about the contract terms.'**

Id. (Emphasis added)

In our case, the first prong completely fails because there never was an "agreement" as required. An agreement requires consideration and a meeting of the minds. There was never any consideration tendered by Woodmen and Lewis never agreed to arbitration. As already pointed out, Woodmen does not even have the right to invoke arbitration, only members do. As to whether or not the parties' dispute is within the scope of the arbitration agreement, Woodmen filed the law suit asking for damages, costs, attorney's fees, etc. without ever asking for arbitration, so how could the "dispute" be within the scope of the arbitration agreement? Indeed, since there never was an arbitration agreement, there could be no dispute arising from something that never existed.

Under the second prong, state defenses such as fraud, unconscionability, duress and lack of

consideration can be imposed. The *East Ford* Court defined unconscionability, citing *Entergy Miss., Inc. v. Burdette Gin Co.*, 726 So.2d 1202 (Miss. 1998): "Unconscionability has been defined as 'an absence of meaningful choice on the part of one of the parties, together with contract terms which are unreasonably favorable to the other party.' To show that a provision is conscionable, the party seeking to uphold the provision must show that the provision bears some reasonable relations to the risks and needs of the business." The Court went on to say that procedural unconscionability falls into the areas of lack of knowledge and lack of voluntariness, stating that a lack of voluntariness can be shown by the use of contracts of adhesion "...when there is a great imbalance in the parties' relative bargaining power, the stronger party's terms are unnegotiable, and the weaker party is prevented by market factors, timing or other pressures from being able to contract with another party on more favorable terms or to refrain from contracting at all." *Id.*

Woodmen claims to have sent out ballots to members to vote upon the amendment, but there is no proof that such a ballot was sent to Lewis. According to Woodmen in part of its Exhibit F to its Motion to Compel Arbitration, its national president in 1996, John G. Bookout proclaimed that there were 226 eligible voters to whom ballots were sent, and 205 ballots were returned. It should not be too difficult to produce those ballots to see who voted for what. Judging by the amount of junk mail one receives every day, it would not be surprising that few members ever saw any such ballot, and even those who did could not have had an idea of what rights they were giving up for nothing but

an assertion that "fraternal" feelings would be improved by a new procedure.

None on the notices to the membership found in Woodmen's exhibits clearly inform the recipient that they were giving up the right to a jury trial and that the American Arbitration Association guidelines prohibit the award of punitive damages. Nor is it made clear that even though the member had to use the new procedure if the member wanted redress about his claim for benefits, that Woodmen could file suit on its fraternal member without warning to reclaim benefits already paid to a member for over two years in an amount to exceed half a million dollars **plus** prejudgment interest, attorney's fees (which is excluded for the member in the arbitration scheme in the amendment) and costs.

Thus, Woodmen's position fails *ab initio*, neither of the required prongs are met and the motion to enforce the "arbitration agreement" must fail.

Although it is clear that Woodmen does not have option to invoke arbitration, it waived any right it might have had by filing suit against Lewis. Filing a Complaint is not filing a motion, because expensive procedures are invoked upon being served with a Complaint, not to mention the even more important emotional turmoil inflicted upon an already critically ill individual. The usual procedure found in the cases relating to arbitration is for a party to file suit against the company or institution for damages in state court, and the other party moves for a stay of the initial law suit while moving for arbitration of all the issues. As already mentioned, the only conflict Lewis had with

Woodmen was the question of paying the policies under a reservation of rights, and it was Woodmen who never requested arbitration who filed the law suit against Lewis.

Now Woodmen is in a position of being plaintiff against Lewis and necessarily asking the court to stay its own demand for damages against Lewis as set out in its Complaint. Of course, Woodmen wants all its issues, including damages, decided by arbitration. Not surprisingly, Woodmen also wants Lewis' Counter Claim and Third Party Complaint decided by its arbitrator, which were filed before this Motion to Compel Arbitration was even made.

The cases in the Fifth Circuit concerning waiver of arbitration generally hold against such waiver, but upon facts which materially differ from this case. Basically, the law is that arbitration is favored and it takes a strong showing in order to constitute waiver. The critical prerequisite to these holding, however, was that there was no doubt as to the agreement to arbitrate with the terms of the arbitration being strictly ruled by the agreement itself. If the arbitration agreement is mutually agreed upon, and it is clear that arbitration pertains to the dispute in issue, then: "Waiver of arbitration is not a favored finding and there is a presumption against it." *Lawrence v. Comprehensive Business Services Co.*, 833 F.2d 1159, 1164 (5th Cir. 1987).

However, in this case, the arbitration procedure requires the insured to instigate the process according to its own terms in the amendment. Thus, Woodmen has filed its suit against Lewis, thereby initiating the

judicial process, and has waived the issue of arbitration. In *Frye. v. Paine Webber*, 877 F.2d 396 (5th Cir. 1989), the Court reversed a trial court's order to compel arbitration:

> Despite the strong federal policy favoring arbitration, the right to arbitration may be waived. *Price v. Drexel Burnham Lambert, Inc., 791 F.2d 1156, 1159 (5th Cir. 1986 (citing Miller Brewing Co. v. Fort Worth Distributing Co., Inc. (FWDC), 781 F.2d 494, 497 (5th Cir. 1986)* and *Sedco, Inc. V. Petroleos Mexsicanos Mexicazn Mexican National Oil Co. (Pemex), 767 F.2d 1140, 1150 (5th Cir. 1985).* While the party claiming waiver has a heavy burden, 'waiver will be found when the party seeking arbitration substantially invokes the judicial process to the detriment or prejudice of the other party.' *Price, 791 F.2d at ll58. Id.*

Woodmen argues that Lewis agreed to any amendments contained in his insurance policy, and that Woodmen complied with Mississippi law when it amended its constitution to allow for arbitration. The policy language which contains the "agreement" also says "...but will not take away or reduce any of the benefits of this policy." Since no one explained the rights being lost to policy holders, as discussed above, it can not be seriously argued that Lewis agreed to the amendment made years later. The Mississippi statute relied upon by Woodmen as to the legality of the amendment reflects a law going back to 1930 favoring fraternal societies by allowing fundamentally unfair advantages against an individual as denial of a jury trial without a knowing waiver if one accepts Woodmen's interpretation. It is doubtful that such an interpretation would pass Constitutional muster.

There can be no doubt of Woodmen's intentions in the use of their complaint against Lewis, asking for arbitration, and failing that, for declaratory judgment for over a half a million dollars. Woodmen does not want a jury trial which would expose their conduct in this case to ordinary citizens. Lewis timely filed his Motion for Jury Trial, dated June 6, 2002 and marked "Filed" on June 7, 2002. Woodmen filed its response, dated June 20, 2002, opposing the jury trial request, stating that the defendant "...is not entitled to a jury trial on any of the issues in this action." Of course, some of the issues in this action are reflected in Lewis' Counterclaim and Third Party Complaint, and as already mentioned, Woodmen wants these actions sent to arbitration where there will be no jury and no possibility of punitive damages.

Woodmen cites several cases from trial courts, but no Circuit Court of Appeals cases from any Circuit. There is one case apparently from the South Carolina Court of Appeals, but it can not be determined by the cite provided as none of the cites, except one, can be accessed either because it is a trial court opinion not yet printed or can be found. None on this cases were provided in Woodmen's brief as required.

In the case which could be found, *Woodmen of the World Life Insurance Society v. White*, 35 F.Supp.2d 1349 (M.D. Ala. 1999), the action was begun in a state court by an insured, as is customary in these cases as already mentioned. This case, and presumably all the others cited by Woodmen, are materially different from the case *sub judice*, are not from the Fifth Circuit, are not written by any Circuit Court, and are not binding here.

III. Conclusion

The Problem Resolution Procedure, including resort to arbitration, is clearly written for the invocation by a "member or benefit certificate owner or beneficiary seeking to initiate the problem resolution procedure." No where does it say the Society may initiate. Woodmen, by its own actions, does not really interpret that language any differently because it has not even followed its own procedures set out in the amendment. Woodmen has not contacted a Problem Resolution Officer as required in Step 1. Woodmen has not engaged in any informal negotiation. Woodmen has not requested mediation as set out in Step 2. The only thing Woodmen has done is to sue its own insured to demand arbitration and a judgment amounting to over half a million dollars and cessation of its insured's future benefits in the approximate amount of an additional $360,000.00.

All the cases relating to arbitration require the formation of an agreement and a strict resort to the language of that agreement to determine the rights and duties of the parties. The language is clear-only the insured can invoke the Problem Resolution Procedure. Woodmen has already done what it can do under the insurance policy and amendment-sue its insured while the insured can not resort to the courts itself, an unconscionable result prohibited by the substantive Mississippi law.

Respectfully submitted,
ROLAND C. LEWIS

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Supreme Court, U.S.
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No. 04-1623

IN THE

Supreme Court of the United States

IN RE: ROLAND C. LEWIS

ON PETITION FOR WRIT OF MANDAMUS TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

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CORPORATE DISCLOSURE STATEMENT

Respondent, Woodmen of the World Life Insurance Society, Omaha, Nebraska, is a fraternal benefit society and is not a publicly traded entity.

Respondent, Monarch Life Insurance Company, Springfield, Massachusetts, is a wholly owned subsidiary of Regal Reinsurance Company, which is not a publicly traded entity.

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REASONS FOR DENYING THE PETITION

The question presented for review in Petitioner's Petition for Writ of Mandamus is only relevant to whether there exists a valid arbitration agreement between the parties, which is an issue that has already been addressed by the courts below. As set forth in the opinions attached to the Petition, the United States District Court for the Southern District of Mississippi held a valid arbitration agreement exists but, because of the way the arbitration agreement was worded, concluded that Respondents could not invoke it. Respondents appealed the district court's order, and the United States Court of Appeals for the Fifth Circuit held that Respondents could invoke the arbitration provision. Petitioner did not appeal the district court's finding that there was a valid arbitration agreement; therefore, the issue of unconscionability - which the Petitioner requests that the Fifth Circuit be ordered to address - was not an issue presented on appeal. Additionally, Petitioner did not seek a writ of certiorari seeking to appeal the decision of the Fifth Circuit.

Because the Fifth Circuit did not focus on unconscionability in its opinion, Petitioner asserts that "[n]ot to do so in [this] case is an abuse of discretion." Pet. at 11. However, Lewis' Petition presents no basis for disturbing the Fifth Circuit's decision compelling arbitration, nor offers any clear and indisputable evidence warranting mandamus. Accordingly, Petitioner's argument for mandamus to the Fifth Circuit to address this issue is, therefore, without merit.

1. The Fifth Circuit had no duty to consider the issue of unconscionability, as the issue was not challenged by Petitioner in the district court, and the Fifth Circuit fully addressed all issues that were properly appealed.

In his Petition for Writ of Mandamus, Petitioner requests this Court order the Fifth Circuit to "explain its refusal to consider the issue of unconscionability and direct that it do so." Pet. at 13. However, in ordering that the Petitioner be compelled to arbitrate, the courts below have already, if not directly, addressed this issue.

The issue of unconscionability is only relevant in determining whether there exists a valid agreement to arbitrate. The district court found that an enforceable agreement to arbitrate was present, but the agreement could only be invoked by a member of the society, not by Woodmen of the World Life Insurance Society. Pet. at 22a. Petitioner did not appeal the district court's order stating that there was a valid arbitration agreement. Therefore, unconscionability was not a relevant issue raised on appeal, and the Fifth Circuit had no duty to decide this issue. Pet. at 9a. In reversing the decision of the district court denying Respondents' motion to compel arbitration, the Fifth Circuit expressly ruled that Petitioner is compelled to arbitrate his claims. Pet. at 10a. The Fifth Circuit further found that the district court had not addressed the issue of unconscionability, and as such declined to consider it. Pet. at 3, 9a-10a.

Because Lewis failed to challenge the validity of the arbitration agreement on appeal, the Fifth Circuit applied the well-settled rule that issues raised for the first time on appeal are not reviewed unless they involve purely legal questions and failure to consider them would result in manifest

injustice. *United States v. Martinez*, 228 F.3d 587 (5th Cir. 2000), *citing Diaz v. Collins*, 114 F.3d 69, 71 (5th Cir. 1997). Therefore, the Fifth Circuit did not abuse its discretion in refusing to address an issue or argument presented for the first time on appeal or in a reply brief. *Herrman Holdings, Ltd. v. Lucent Technologies, Inc.*, 302 F.3d 552, 562 (5th Cir. 2002); *Comsat Corp., et al. v. Federal Communications Comm'n*, 250 F.3d 931, 937 (5th Cir. 2001); *Whitehead v. Food Max of Miss., Inc.*, 163 F.3d 265, 270 (5th Cir. 1998).

Since the Petitioner failed to challenge the issue of unconscionability, the Fifth Circuit correctly ruled that he waived his right to invoke this issue on appeal. The Petitioner essentially admits this in his Petition by stating "[i]n considering applying for a Writ of Certiorari in this case, it became clear that there was nothing to appeal." Pet. at 12. "The decision by an inferior court upon any matter left open by the mandate and opinion of a higher court can be reviewed only upon a new appeal, and not by mandamus." *Ex parte Union Steamboat Co.*, 178 U.S. 317 (1900). In this case, the Petitioner impermissibly seeks by mandamus what he otherwise waived or failed to accomplish on appeal to the Fifth Circuit.

2. Mandamus is improper in this case.

A writ of mandamus is a drastic and extraordinary remedy reserved for "really extra ordinary causes." *Cheney v. United States Dist. Court for Dist. of Columbia*, 124 S. Ct. 2576, 2586 (2004); *Ex parte Collett*, 69 S.Ct. 944 (1949); *Ex parte Fahey*, 332 U.S. 258, 259-60 (1947). A writ of mandamus will not be issued as a matter of right, but is vested in the discretion of the court to which the petition is made.

Cheney, 124 S. Ct. at 2581; *United States ex rel. Turner v. Fisher*, 32 S. Ct. 37 (1911). The remedy of mandamus is a drastic one, to be invoked only in extraordinary situations and reserved for cases of extreme necessity. *Allied Chemical Corp. v. Daiflon, Inc.*, 101 S. Ct. 188 (1980). "To ensure that mandamus remains an extraordinary remedy, petitioners must show that they lack adequate alternative means to obtain the relief they seek, and carry the burden of showing that their right to issuance of a writ is clear and indisputable." *Mallard v. United States Dist. Court for the So. Dist. of Iowa*, 109 S.Ct. 1814 (1989). Therefore, this Court wields broad discretion to issue or deny a petition for writ of mandamus, taking into consideration the necessity and purpose of the writ.

In deciding whether a writ of mandamus should be issued, "the party seeking issuance of the writ must have no other adequate means to attain the relief he desires, – a condition designed to ensure that the writ will not be used as a substitute for the regular appeals process." *Cheney*, 124 S. Ct. at 2587, *citing Fahey, supra*, at 260. Second, the petitioner must satisfy "the burden of showing that [his] right to issuance of the writ is 'clear and indisputable.'" *Id.* at 2587, *quoting Bankers Life & Cas. Co. v. Holland*, 346 U.S. 379, 384 (1953). Third, "even if the first two prerequisites have been met, the issuing court, in the exercise of its discretion, must be satisfied that the writ is appropriate under the circumstances." *Id.* at 2587, *citing Kerr v. United States District Court for No. Dist. of Cal.*, 426 U.S. 394, 403 (1976). According to recent case law, the court may also consider whether the party seeking relief has no other remedy, whether the lower court's decision is clearly erroneous as a matter of law, and whether the trial court's decision raises new and

important issues of law of first impression. *Rees v. United States Dist. Court for Cent. Dist. of Cal.*, 572 F.2d 700 (9th Cir. 1978).

Lewis' Petition does not raise any issues necessary to satisfy the conditions precedent for the issuance of a writ of mandamus. Lewis presents no evidence indicating that the need for issuance of a writ is clear and undisputable, that he has or had no other means to obtain the relief requested, or that the Fifth Circuit abused its discretion in declining to address an issue which the Petitioner otherwise failed to raise on appeal. As Lewis had other available remedies, prior to waiving certain issues presented on appeal, a writ of mandamus would not be proper as it would amount to readjudication of claims and serve, in this case, as a substitute for appeal which the courts below acknowledge that he has waived. *See Pittston Coal Group v. Sebben*, 109 S. Ct. 414 (1988), *see also Will v. United States*, 88 S. Ct. 269,275 (1967) ("Mandamus may never be employed as substitute for appeal").

3. Petitioner's Motion to Stay Arbitration was recently denied in the district court.

Roughly one week after Lewis' Petition for Writ of Mandamus was placed on the docket, Petitioner filed a Motion to Stay Arbitration pending review by this Court. On June 14, 2005, the United States District Court for the Southern District of Mississippi issued an Order denying Lewis' motion to stay arbitration while the Petition is pending. The district court's Order is reproduced at Resp't App. B p.5a.

The pertinent section of the district court's Order states:

> In support of the motion to stay, Lewis argues that the state law doctrine of unconscionability regarding arbitration clauses was not considered by this court or the Fifth Circuit. However, Lewis did not raise this issue until Woodmen appealed this court's Order, and the Fifth Circuit applied its well established policy to ignore all issues not first raised in the district court. Now, the Fifth Circuit has directed arbitration to proceed, and this court has no authority to direct otherwise. . . . Lewis has presented no authority giving this court the power to stay the Circuit Court's Mandate.

Resp't App. B at 6a.

On June 16, 2005, Lewis' filed a Motion to Reconsider the district court's June 14, 2005 Order denying a stay of arbitration while his Petition for Writ of Mandamus is pending. On June 23, 2005, the district court denied Lewis' Motion to Reconsider, which is reproduced at Resp't App. A p.1a.

In denying Lewis' Motion to Reconsider, the district court ruled, in pertinent part:

> After seeking mandamus relief from the United States Supreme Court, Lewis asked this court for a stay of the arbitration proceedings initiated by Woodmen pursuant to the Fifth Circuit's ruling. Lewis contends that the Fifth Circuit's decision is flawed because it is based in part on the conclusion that the issue of unconscionability of

> the arbitration clause was never presented to this court, and no predicate was established for consideration of the unconscionability issue. Lewis says he seeks mandamus to the Fifth Circuit before the United States Supreme Court in order to correct this faulty conclusion. Lewis specifically notes that he presented cases in his brief to this court, and that the necessity for arguing the matter of unconscionability to this court was obviated by the court's ruling in Lewis' favor on other grounds. This court does not quarrel with these factual assertions. Nevertheless, the United States Court of Appeals has issued its mandate for arbitration to proceed, and Lewis seeks to stay the Fifth Circuit's mandate while claiming that he does not wish to interfere with the mandate. The court finds the reasoning to be circular.
>
> In the instant case, Lewis has shown only that he seeks to halt the arbitration ordered by the Fifth Circuit's decision in a case it remanded to this court. The arbitration ordered by the Fifth Circuit in no way interferes with this court's jurisdiction or its ability to manage its cases. This court is bound by the Fifth Circuit's directive. . . .

Resp't App. A p.2a-3a.

The district court's Order denying Petitioner's Motion to Stay while his Petition for Writ of Mandamus is pending, as well as the district court's subsequent Order denying Lewis' Motion that the district court reconsider its Order demonstrates that on more than one occasion, Petitioner has

sought and been afforded meaningful judicial review. The courts below have held that Lewis' request to stay these proceedings does not present extenuating circumstances, is devoid of abuse of judicial discretion, or demonstrates any justifiable basis that he should not be compelled to arbitrate his claims or that the arbitration should otherwise be stayed.

The Fifth Circuit expressly ruled that Lewis' claims are "part and parcel of the dispute to be arbitrated." *See* App. at 10a. Implicit within this ruling is the finding that the arbitration agreement between the parties is valid and not unconscionable. The Petitioner fails to demonstrate any extra ordinary basis or abuse of discretion requiring this Court to mandate the Fifth Circuit to explain the basis for its ruling that the claims of the parties are subject to arbitration.

CONCLUSION

For the foregoing reasons, Respondents Woodmen of the World Life Insurance Society and Monarch Life Insurance Company respectfully request this Court to deny the Petition for Writ of Mandamus.

Respectfully submitted,

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APPENDIX

APPENDIX A — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI, JACKSON DIVISION DATED JUNE 23, 2005

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

Civil Action No. 3:02-cv-182WS

WOODMEN OF THE WORLD LIFE INSURANCE SOCIETY

PLAINTIFF

vs.

ROLAND C. LEWIS

DEFENDANT

ROLAND C. LEWIS

THIRD PARTY PLAINTIFF

vs.

MONARCH LIFE INSURANCE COMPANY

THIRD PARTY DEFENDANT

ORDER

Once again before the court is the matter presented by the defendant/third-party plaintiff Roland C. Lewis as an urgent and necessitous matter under Rule 7.2(H) of the Uniform Rules of this court. Lewis seeks to stay arbitration

in this matter while a motion for mandamus to the United States Court of Appeals for the Fifth Circuit is pending before the United States Supreme Court. Earlier, the Fifth Circuit reversed this court's Order denying Woodmen's motion to compel arbitration of its claims against Lewis, thereby compelling Lewis to arbitrate the disputes between the parties. The Fifth Circuit also reversed this court's Order denying Woodmen's motion to compel arbitration of Lewis's counterclaim and third-party claims against Monarch Life Insurance Company, holding that these claims are part and parcel of the entire dispute to be arbitrated.

After seeking mandamus relief from the United States Supreme Court, Lewis asked this court for a stay of the arbitration proceedings initiated by Woodmen pursuant to the Fifth Circuit's ruling. Lewis contends that the Fifth Circuit's decision is flawed because it is based in part on the conclusion that the issue of unconscionability of the arbitration clause was never presented to this court, and no predicate was established for consideration of the unconscionability issue. Lewis says he seeks mandamus to the Fifth Circuit before the United States Supreme Court in order to correct this faulty conclusion. Lewis specifically notes that he presented cases in his brief to this court, and that the necessity for arguing the matter of unconscionability to this court was obviated by the court's ruling in Lewis' favor on other grounds. This court does not quarrel with these factual assertions. Nevertheless, the United States Court of Appeals has issued its mandate for arbitration to proceed, and Lewis seeks to stay the Fifth Circuit's mandate while claiming that he does not wish to interfere with the mandate. This court finds the reasoning to be circular.

Appendix A

Lewis asks this court to consider the "All Writs Act" and this court's authority to protect its own judgments. The "All Writs Act", Title 28 U.S.C. § 1651, provides that a court "may issue all writs necessary or appropriate in aid of [its] respective jurisdiction." The Fifth Circuit gave guidance to courts applying the All Writs Act in *ITT Community Development Corporation v. Barton*, 569 F.2d 1351 (5 Cir. 1978), stating that the power granted by the All Writs Act, "is firmly circumscribed, its scope depending on the nature of the case before the court and the legitimacy of the ends sought to be achieved through the exercise of the power." *Id.* at 1358-59. The Fifth Circuit particularly noted that a court may not rely on the Act to enjoin conduct that is, "not shown to be detrimental to the court's jurisdiction." *Id.* at 1359. Instead, any order under the Act must be "directed at conduct which, left unchecked, would have had the practical effect of diminishing the court's power to bring the litigation to a natural conclusion." *Id.* So, this court must apply the "All Writs Act" with restraint to control only those actions or other conduct which would inhibit the court's ability to resolve or manage a case before it. *See Williams v. McKeithen*, 939 F.2d 1100, 1104-05 (5th Cir. 1991), reaffirming the approach taken in the *Barton* case.

In the instant case, Lewis has shown only that he seeks to halt the arbitration ordered by the Fifth Circuit's decision in a case it remanded to this court. The arbitration ordered by the Fifth Circuit in no way interferes with this court's jurisdiction or its ability to manage its cases. This court is bound by the Fifth Circuit's directive. Thus, the "All Writs Act" has no application to the instant case.

Therefore, once again, this court finds that the motion of the defendant/third-party plaintiff Roland C. Lewis to stay arbitration in this matter while his motion for mandamus to the United States Court of Appeals for the Fifth Circuit is pending before the United States Supreme Court must be denied.

SO ORDERED this the 23rd day of June, 2005.

s/ HENRY T. WINGATE
CHIEF UNITED STATES DISTRICT JUDGE

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI, JACKSON DIVISION DATED JUNE 14, 2005

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

Civil Action No. 3:02-cv-182WS

WOODMEN OF THE WORLD LIFE INSURANCE SOCIETY

PLAINTIFF

vs.

ROLAND C. LEWIS

DEFENDANT

ROLAND C. LEWIS

THIRD PARTY PLAINTIFF

vs.

MONARCH LIFE INSURANCE COMPANY

THIRD PARTY DEFENDANT

ORDER

Before the court is the motion of the defendant/ third-party plaintiff, presented as an urgent and necessitous matter under Rule 7.2(H) of the Uniform Rules of this court, to stay arbitration in this matter while a motion for mandamus

to the United States Court of Appeals for the Fifth Circuit is pending before the United States Supreme Court. Earlier, the Fifth Circuit reversed this court's Order denying Woodmen's motion to compel arbitration of its claims against Lewis, thereby compelling Lewis to arbitrate the disputes between the parties. The Fifth Circuit also reversed this court's Order denying Woodmen's motion to compel arbitration of Lewis's counterclaim and third-party claims against Monarch Life Insurance Company, holding that these claims are part and parcel of the entire dispute to be arbitrated. Now, Lewis approaches this court for a stay of the arbitration proceedings initiated by Woodmen, contending that this court should do so because a motion for mandamus to the Fifth Circuit is pending before the United States Supreme Court.

In support of the motion to stay, Lewis argues that the state law doctrine of unconscionability regarding arbitration clauses was not considered by this court or the Fifth Circuit. However, Lewis did not raise this issue until Woodmen appealed this court's Order, and the Fifth Circuit applied its well established policy to ignore all issues not first raised in the district court. Now, the Fifth Circuit has directed arbitration to proceed, and this court has no authority to direct otherwise. Lewis urges the court to look to the cases holding that district courts have the authority to vacate arbitration awards. Certainly, this court may have the power in certain circumstance to set aside an arbitrator's findings, but this is not the same thing as interfering with or impeding the Mandate of the Fifth Circuit Court, and Lewis has presented no authority giving this court the power to stay the Circuit Court's Mandate.

Accordingly, the motion of the defendant/third-party plaintiff Roland C. Lewis to stay arbitration in this matter while his motion for mandamus to the United States Court of Appeals for the Fifth Circuit is pending before the United States Supreme Court must be denied.

SO ORDERED this the 14th day of June, 2005.

s/ HENRY T. WINGATE
CHIEF UNITED STATES DISTRICT JUDGE